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Supreme Court, U.S.
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07-787 DEC 10 2007
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No.

# In the Supreme Court of the United States

**MARY A. KELLEY, Individually and as Trustee,**

*Petitioner,*

v.

**THE STATE OF ILLINOIS, Department of Transportation,**

*Respondent.*

**On Petition for Writ of Certiorari to the Illinois Appellate Court for the Third District of Illinois**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the State of Illinois by mandating the use of the Unit Rule of Valuation so as to artificially lower the market value of property, deprives landowners of their constitutional right to "just compensation" in partial take eminent domain cases in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

## LIST OF PARTIES

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4. Opinion of Appellate Court Third District Filed June 1, 2007. (Hereinafter referred to as Kelley II.)

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## STATEMENT OF BASIS FOR JURISDICTION

1. Date of First Judgment to be Reversed: September 10, 2004. (Kelley I) Illinois Appellate Court Third District.

2. Date of Order of Illinois Supreme Court Denying Petition for Leave to Appeal: November 24, 2004.

3. Date of Second Judgment to be Reversed: June 1, 2007. (Kelley II) Illinois Appellate Court Third District.

4. Date of Order of Illinois Supreme Court Denying Petition for Leave to Appeal: September 26, 2007.

### Statutory Provision Conferring Jurisdiction

28 U.S.C. §1257(a)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Notice Under Rule 29.4 is not required as the State of Illinois is a party to this action.

## CONSTITUTIONAL PROVISIONS INVOLVED

### Constitution of the United States

### Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment XIV

§ 1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THIS CASE

On December 13, 2000, Respondent State of Illinois by its Department of Transportation ("IDOT"), filed a Complaint for Condemnation in the Circuit Court of Will County, Illinois against Defendant Mary A. Kelley, as Trustee under a Trust Agreement dated the 1st day of July, 1975, and known as Trust Number 1 ("Kelley"), to condemn a strip of land 1.047 acres in size to expand the Right of Way of State Highway Route 59 in Plainfield, Illinois. The farm from which comes the part taken is 289.284 acres, and is a contiguous parcel of land. Most of the farm consists of vacant farmland, with a small portion of wetland along the DuPage River and is improved with Petitioner's home. Route 59 is an area of large commercial growth with several "big box" stores - Target, Wal-Mart, Kohls, Menards, Jewel-Osco and Meijers being developed.

After initial pre-trial discovery and the exchange of expert appraisals regarding the subject property, it became apparent that IDOT's expert considered the "whole" of the property to be the entire ±289 acres, while Kelley's expert Andrew Brorsen ("Brorsen"), considered the "whole" or "larger parcel" to be only the west ±80 acres because it had a unified highest and best use - commercial. As a consequence, Brorsen's initial valuation of the property was derived through the comparable sales method for only the west ±80 acres of the farm bordering on Route 59 which he considered had a highest and best use for commercial development. He used primarily comparable sales for commercial development.

IDOT filed a motion in limine to bar valuation expert Brorsen from testifying at trial on the ground his testimony would violate the Illinois Unit Rule of Valuation.

The trial court denied IDOT's motion to bar Brorsen's testimony but IDOT took an Interlocutory Appeal. On September 10, 2004, the Appellate Court reversed the trial court barring Brorsen's testimony (hereinafter referred to as Kelley I). Appendix Item 2.

The case proceeded to jury trial on March 7, 2006. IDOT called Appraiser Charles Southcomb (R35) as its valuation witness who opined the value of the part taken as part of the whole 289 acres was only $48,000. Mr. Southcomb testified to numerous comparable sales of commercial property along Route 59 - (Jewel-Osco $125,453 per acre) (self-storage warehouse $109,336 per acre) (Menards $92,347 per acre) (Meijers $117,612 per acre) (R56-57). However, he testified the Illinois Unit Rule required he value the part taken as the average per acre value of the entire farm.

Respondent called Mr. Andrew Brorsen. He was not permitted to testify on the basis of the Appellate Court opinion and mandate in Kelley I. Defendant made an offer of proof out of the presence of the jury.

Brorsen testified that he used the "larger parcel theory" to determine the "whole" from which the part is taken. He identified the west 80 acres of the Kelley farm as the "whole" because its highest and best use is commercial. He described the larger parcel theory in detail (R95) and opined that the value of the part taken is $104,700 (R105). Later Mr. Southcomb was

called by Petitioner in the Offer of Proof and he admitted testifying previously that he arrived at a value of $92,000 per acre using the larger parcel theory! (R138). He testified that the terms "larger parcel" and "the whole" are synonymous (R145).

The jury returned a verdict of $70,900. The trial judge granted Respondent's motion and reduced the verdict to $48,300 from which judgment the Petitioner appealed to the Third Appellate District for a second time (hereinafter referred to as Kelley II)

On June 1, 2007, the Appellate Court rendered its opinion. (Appendix Item 4) Petitioner filed a Petition for Rehearing and for a Certificate of Importance. Both were denied on July 6, 2007 . A Petition for Leave to Appeal was made by the Petitioner to the Illinois Supreme Court which was denied on September 26, 2007 (Appendix Item 6).

Raising the Federal Question.

In the oral ruling by Judge James E. Garrison, the federal constitutional question of just compensation was raised (Appendix Item 7). The federal constitutional issues were raised in Petitioner's written brief in the Appellate Court (Appendix Item8) and in the Appellate Court Opinion in Kelley I (Appendix Item 2). The federal constitutional questions were raised again in the Petitioner's appellate brief in Kelley II (Appendix Item 9).

## ARGUMENT

It is within the Supreme Court's power to determine what is just compensation. *United States v. New River Collieries Co.*, 262 U.S. 341, 67 L.Ed. 1014, 43 S.Ct. 565 (1923); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 37 L.Ed 463, 13 S. Ct. 622 (1893). The court's power to determine the rules of compensation stems from the Fifth Amendment to the United States Constitution, which clause is made applicable to the States by the Fourteenth Amendment, *Chicago B&Q R. Co. Vs. Chicago*, 166 U.S. 226 (1897). Early on, the Supreme Court adopted the fair market value concept of compensation. *McCandless v. United States,* 298 U.S. 342, 80 L.Ed. 1205, 56 S.Ct. 764 (1936). "Market value" has been defined as the value that informed persons would agree to between themselves, being under no compulsion either to buy or to sell. *United States v. Miller,* 317 U.S. 369, 87 L.Ed. 336, 63 S.Ct. 276 (1943); *Olson v. United States*, 292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704 (1934). This remains this court's definition of just compensation to this very day. *Kelo et al v. City of New London*, 545 U.S.469, 2005. 04-108 (S.Ct. 6-23-05.)

Similarly, the Illinois constitution provides that "private property shall not be taken or damaged for public use without just compensation as provided by law". Ill. Const. 1970, art. I, § 15. "Just compensation" is defined as the fair, cash market value of the property at its highest and best use. *City of Chicago v. Anthony,* 136 Ill. 2d 169, 174 (1990). *State of Illinois v. Kelley,* (Kelly I) 352 Ill. App. 3rd 278, 815 NE2d 1214, 287 Ill. Dec. 411 (3rd Dist. 2004).

Since 1873, Illinois has had a special valuation rule of evidence in eminent domain cases commonly known as the "Unit Rule". This rule was adopted by the Illinois Courts for laudable purposes to prevent abuses by condemners that unfairly deprive landowners of just compensation.

First, in partial take cases, the Unit Rule requires that the part taken be valued as a part of the whole tract from which it is taken. This prevents condemners from arguing that an odd shaped long narrow strip it selects has no market value except what the condemner is willing to pay for it.

Second, the Unit Rule requires that the value of a parcel of land not be determined by aggregating the values of its parts; i.e. so much for land, for trees, for buildings, for ore deposits, etc. Land must be valued as a unit with all its parts taken into consideration.

The problem arises when the part taken comes from a large tract that has several parts with different highest and best uses which translate into different values for different parts. Expert real estate appraisers can easily identify these "zones" of use and opine as to the fair market value of each. This methodology is called the "larger parcel" theory of valuation. It is specifically mandated in federal land acquisitions. *Uniform Appraisal Standards for Federal Land Acquisitions* (Washington, D.C.: U. S. Government Printing Office, 1992). J.D. Eaton, *Real Estate Valuation in Litigation,* Chapter 5, pages 75-101, Appraisal Institute, 1995.

Unfortunately, the Illinois Courts do not permit appraisers to employ the larger parcel theory claiming

it divides the parcel into different zones of value which is forbidden by the Unit Rule. (Oddly, the Illinois Courts allow appraisers to testify to different highest and best uses throughout the tract.)

This application of the Unit Rule opens the door to abuse by condemners by forcing land appraisers to use an average value price for the entire tract as the value of the part taken. The culprit is "Size Regression". "Size Regression" is the basic economic principle that as the number of units of a commodity increases, the price per unit paid for the commodity decreases. It is the concept of the bulk sales discount. As applied to land, as the number of units (e.g. acres, square feet) in a tract of land increases, the price or value, per unit tends to decrease. J.D. Eaton, *Supra,* page 88.

However, the jury never hears about this because the landowner's appraiser cannot logically explain how he arrives at a higher than average value. On the other hand it falsely emphasizes the testimony of the condemner's appraiser as logical and proper when it is grossly misleading.

In this case the Respondent's Appraiser Southcomb averaged the values of the commercial, residential and wetland portions of the Petitioner's farm then opined that the value of the part taken is the average per acre value of only $48,300. This is far below the actual market value of that part of the land with commercial highest and best use in excess of $100,000 per acre.

Unfairly, petitioner's appraiser Brorsen was barred from testifying using the larger parcel theory, thereby keeping from the jury the actual fair cash market

value of the part taken resulting in an artificially low jury award.

Two justices of the Illinois Appellate Court in Kelley I wrote in their concurring opinion:

> "In the instant matter, the evidence clearly established that the highest and best use of the property was not uniform throughout the tract in question. Evidence established that there were tracts of commercial, residential, agricultural and wetlands throughout the whole tract. Reading HP/Meachum as an exception to the unit rule, I would hold that, where it is the whole of the parcel, an appraiser may testify to the value of the different portions of the parcel, including the parcel to be taken.
>
> The purpose to be accomplished in condemnation proceeding is to provide "just compensation" to the landowner as determined by the fair cash market value of the property at its highest and best use. City of Chicago v. Anthony; 136 Ill. 2d 169 (1990). The "unit rule" almost never achieves that purpose. Simply put, the "unit rule" ignores realities of land valuation and should give way. The approach articulated in HP/Meachum, is not an extension of the unit rule, but an exception that should be allowed to swallow up the rule. Our supreme court should revisit is issue."

App. 12-13.

The Illinois Supreme Court twice refused to do so without explanation. We cannot understand why it chose not to use this opportunity except for the fact a correct ruling will result in higher jury awards and more costs for the state for land acquisitions.

This Petitioner asks the Supreme Court of the United States to halt the abuse of Petitioner's Constitutional rights and those of other Illinois landowners similarly situated by reversing the orders of the Illinois Appellate Court Third District in both Kelley I and Kelley II and to remand the case for jury trial with instructions that Petitioner's Appraiser Brorsen be allowed to testify using the "larger parcel" theory of valuation.

Respectfully submitted,

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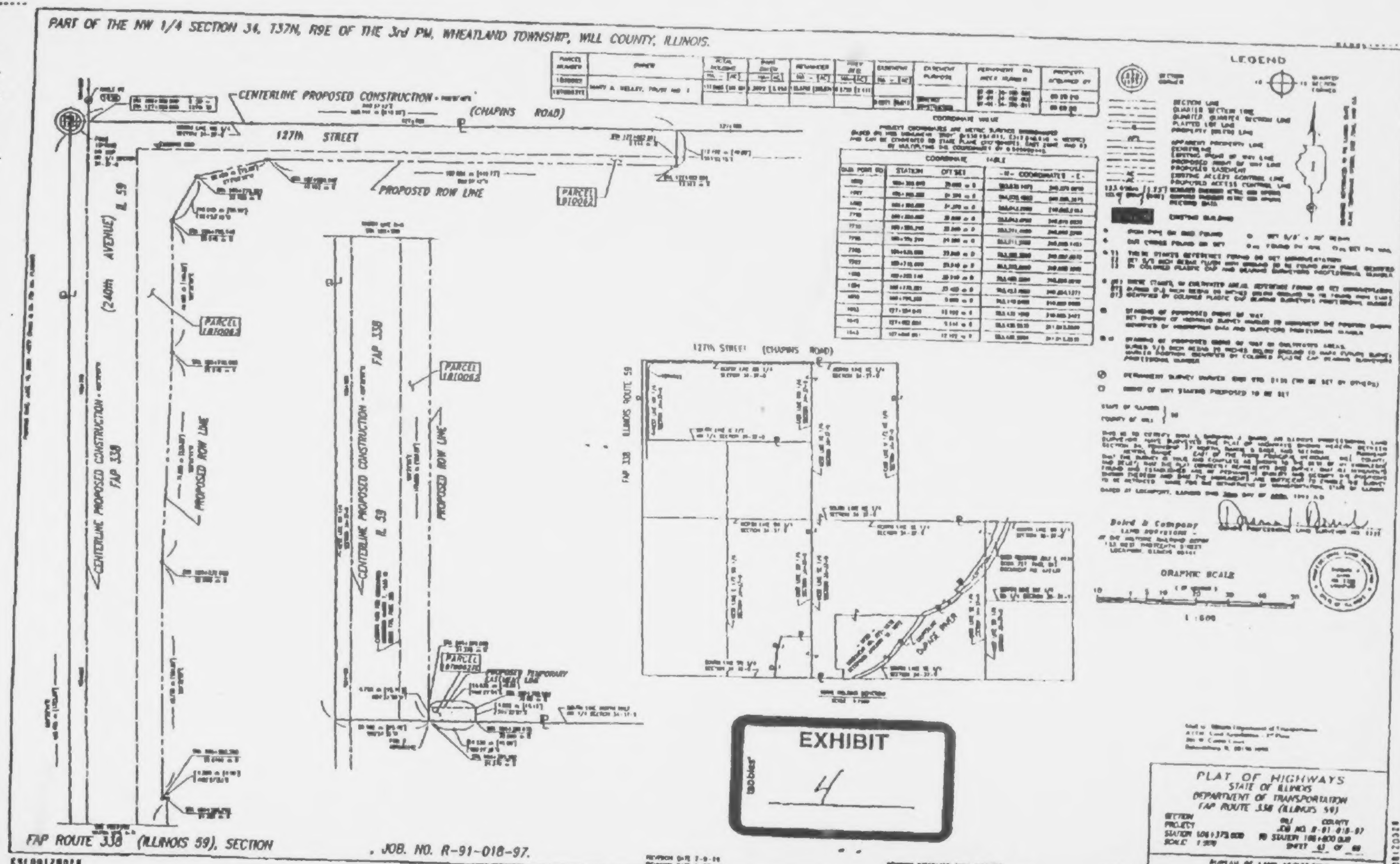
# APPENDIX



PART OF THE NW 1/4 SECTION 34, T37N, R9E OF THE 3rd PM, WHEATLAND TOWNSHIP, WILL COUNTY, ILLINOIS.
CENTERLINE PROPOSED CONSTRUCTION
(CHAPINS ROAD)
127th STREET
PROPOSED ROW LINE
PARCEL
(240th AVENUE)
IL 59
FAP 338
COORDINATE TABLE
LEGEND
127th STREET (CHAPINS ROAD)
FAP 338 ILLINOIS ROUTE 59
DUPAGE RIVER
Baird & Company
GRAPHIC SCALE
1 : 600
EXHIBIT
4
PLAT OF HIGHWAYS
STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION
FAP ROUTE 338 (ILLINOIS 59)
FAP ROUTE 338 (ILLINOIS 59), SECTION
JOB. NO. R-91-018-97.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BEST AVAILABLE COPY

App. 1

STATE OF ILLINOIS

3-03-0282

IDOT V. Kelley

**APPELLATE COURT THIRD DISTRICT**

OTTA'WA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord Two thousand four, within and for the Third District of Illinois:

Present -

HONORABLE WILLIAM E. HOLDRIDGE, Presiding Justice x

HONORABLE KENT SLATER, Justice

HONORABLE DANTEL L. SCHMIDT, Justice x

HONORABLE TOBIAS G.. BARRY, Justice

HONORABLE TOM M. LYTTON, Justice x

HONORABLE MARY W. McDADE, Justice

HONORABLE MARY K. O'BRIEN, Justice

GIST FLESHMAN, Clerk -

BE IT REMEMBERED, that afterwards on

September 10, 2004 the Opinionof the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

App. 3

No. 3-03-0252

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2004

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,

Plaintiff-Appellant,

v,

MARY A. KELLEY, as Trustee
under a Trust Agreement dated
the 1st day of July, 1975, and
known as Trust Number 1, and
UNKNOWN OWNERS,

Defendants-Appellees.

Appeal from the Circuit Court
of the 12th Judicial Circuit
Will County, Illinois

No. 00-ED-218

Honorable Amy Bertani-Tomczak and
James E. Garrison,
Judges, Presiding

JUSTICE LYTTON delivered the opinion of the court:

The Illinois Department of Transportation (IDOT) filed a complaint for condemnation against Mary Kelley, as Trustee under a land trust, to acquire 1.047 acres of land for the purpose of widening an intersection in Plainfield. Defendants' two appraiser valued different portions of land separately, claiming that the condemned acreage should not be subject to the unit rule of valuation. IDOT filed two pretrial motions to bar their testimony, claiming that their appraisal methods violated the unit rule. The court denied the motions. Plaintiff filed a motion for certification of questions under Supreme Court Rule 308, which the court allowed. We -answer the certified questions and remand, finding that dividing indistinct portions of the whole violates the unit rule of valuation.

## I. FACTS

IDOT filed a complaint against the defendant land trust to condemn part of the land pursuant to the "[Fiscal Year] 2000 Highway Improvement Project." IDOT intended to take a 1.047 acre portion of the 289 acre land trust to widen the intersection of Route 59 and 127th Street in Plainfield. The land trust includes a home valued at over $1, 000,000 and a second farm residence. The remainder of the property includes farmland and a small segment of wetland along the DuPag,e River.

The court held a quick take hearing to determine a preliminary valuation.. IDOT's appraiser argued that the entire parcel's highest and best use was mixed-use development. He regarded the whole to be the entire 289 acres owned by the trust. Defendants' appraiser,

Arthur Sheridan, used the "sales comparison approach," in which he assigned different square foot values to areas of the property that had different highest and best uses. Sheridan assigned a higher value to the area from which IDOT was-taking the property because, in his opinion, it had commercial potential and was more valuable than the other areas. He did not combine the different values into the whole property. The trial court found the preliminary valuation equal to the amount determined by IDOT' s expert.

Defendants then retained a second expert, Andrew Brorsen. In his appraisal, Brorsen divided the 289 acre parcel and determined what he considered the most commercially viable 80 acres to be the whole of the property.

IDOT filed a motion for a judicial determination of what the "unit rule" of valuation in his appraisal. The trial court agreed with IDOT and held that the whole property included the entire 289 acres. Defendants then moved for leave to amend Brorsen's appraisal based on the judicial determination. The court granted the motion.

Brorsen then filed a second appraisal in which he divided the 289 acre whole into separate parts according to what he termed three "zones of use:" (1) an 80 acre zone of commercial use, (2) a 201 acre zone of residential subdivision use, and (3) a 10 acre zone of residential estate use. Each discrete zone then had its own value and never became part of the whole. Brorsen claimed that modern, appraisal and development trends supported this type of dividing the whole.

IDOT filed a motion to bar Brorsen and Sheridan from testifying, claiming that their appraisals violated the unit rule of valuation. The trial court denied the motion. IDOT filed a Rule 308 (a) motion for interlocutory appeal, and the court certified two questions for our review. Both questibns present the same general issue: in a partial taking eminent domain action, does the unit rule of valuation prohibit appraisers from valuing portions of the whole differently and separately from the whole?[1] We believe the unit rule generally prohibits such valuations, except when the party has cleary delineated different highest and best uses.

---

[1] The certified questions were: Question I: "Whether in a partial taking eminent domain action the Defendant's expert Sheridan should be barred from testifying pursuant to the Illinois Unit Rule because his appraisal values the part taken at a different value per square foot than other areas of the whole parcel. Further, if Mr. Sheridan is not barred from testifying, may he be cross examined regarding the unit rule and his breaking down the area of the whole into different values per square foot pursuant to the Federal Rules of Evidence 703 and.* 705 and Wilson v. Clark, 84 Ill. 2d 186, 417 N.~.2d 1322 (1981).

Question II: "Whether Defense expert Brorsen should be barred from testifying where all expert witnesses agree the highest and best use of the whole is mixed use development', and where the Defendant's expert Brorsen bases his opinion of value on an alleged modern trend' in appraising real estate called the "Larger Parcel Theory" which divides the whole into three zones of use" according to his opinion of "highest and best use". Further if Brorsen is not barred from testifying, whether such testimony is admissible pursuant to the unit rule and subject to cross examination under the Federal Rules of Evidence 703 and 705 and Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

## ANALYSIS

The fifth amendment to the United States, Constitution provides that private property shall not be "taken for public use, without just compensation." U.S. Const., amend. V. Similarly, our State constitution provides that "private property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art. I, § 15. "Just compensation" is determined by the fair cash market value o~ the property at its highest and best use. City of Chicago v. Anthony, 136 Ill. 2d 169, 174 (1990). The purpose of just compensation is to put the property owner in the same economic position as if no condemnation took place; it should not result in financial improvement or excess. People ex rel. Director of Finance v. Young Women's Christian Association, 74 Ill. 2d 561, 572 (1979), overruled on other crounds by People V. Ortiz. 196 Ill. 2d 236 (2001).

A "partial taking" occurs when only a portion of a whole tract is taken by eminent domain. City of Svrin~field V. West Koke Mill Development Corp., 312 Ill. App. 3d 900, 904 (2000). The unit rule provides that, in partial takings, the part taken must be valued as part of the whole, with all capabilities and best uses considered. Forest Preserve District of Cook County v. Wing, 305 Ill. 194, 196 (1922). In short, the taken portion cannot be valued as a separate tract from the whole. The unit rule is echoed in the Illinois Pattern Jury Instructions:

> [ilin arriving at the fair cash market value of the property taken, you should &etermine its

> value considered as a part of the whole tract before the taking and not its value as a piece of property separate and disconnected from the rest of the tract." IPI Civil 3d No. 300.44.

Not every part of a tract will be as valuable as other parts, and different highest and best uses may be used in valuing the tract as a whole. Department of Public Works v. Foreman State Trust and Savinqs Bank, 363 Ill. 13 (1936). It may be proper to assign a highest and best use for one portion of the property and a different highest and best use for another. Departmentof Public Works v. First National Bank of Joliet, 9 Ill. App. 3d 633 (1973). Numerous assignments of use for different parts of the land does not necessarily conflict with the unit rule because it allows the owner to be made whole; it is an eqtiitable resolution to accurately valuing property with different highest and best uses. Tri-State Park District v. First National Bank of Chicago, 33 Ill. App. 3d 348, 351 (1975).

The unit rule generally prohibits land, in partial takings, from being valued differently and separately from the whole. Wing, 305 Ill. At 196. However, in Department of Transportation v.HP/Meachum Land Limited Partnership, 245 Ill. App. 3d at 252 (1993), the court extended the unit rule to allow for certain partialtakings to be valued separately if there are clearly cognizable different highest and best uses for the land. In partial takingswhere different portions of the property are recognizably distinct from each other, the different portions may be valued separately from each other. HP/Meachum, 245 Ill. App. 3d at 255-56.

HP/Meachum involved a partial taking where the whole tract included wetland and non-wetland acreage. IDOT sought to take a portion which was composed primarily of buildable, non-wetland property, but which also contained a small percentage of the non-buildable, wetland property. EP/Meachuin, 245 Ill. App. 3d at 253. The court found that strict application of the unit rule would misrepresent the true value of the specific -portion taken because the recognizably distinct wetland portion was of little value: when compared to the buildable, non-wetland property. EP/Meachum, 245 Ill. App. 3d at 256-57. The court permitted a narrow extension of the unit rule because it recognized the substantial differences in value between the wetland and non-wetland property; each was easily identifiable and uniform within their respective portions Cf. City of Springfield v. West Koke Mill Development Corp., 312 Ill. App. 3d 900, 904 (2000) (holding that land which includes highway easement and accompanying drainage ditch may be valued lower than farmland in the same whole).

However, the facts in this case do not provide the same clearly delineated boundaries. Even the defendants' appraisers could not agree as to where one "zone of use" began and another ended. The state's appraiser, on the other hand stated that the only highest and best use of the whole property was mixed-use development. The vague *and somewhat confusing appraisals submitted by defendants' appraisers bring into focus the import and intent of the unit rule, that is, to prevent misrepresentation of the value of condemned property. The purpose of eminent domain is to provide just compensation to the land-

owner, not to provide a windfall or financially improve the landowner. YWCA, 74 Ill. 2d at 572.

In partial takings such as the one here, a court may find that when different uses of the propert.y are easily delineated separate valuation may be appropriate; With a less certain standard, the unit rule unravels altogether, and just compensation becomes an increasingly difficult and fluid proposition to resolve. We find no compelling reason to abandon the unit rule in this case.

Accordingly, we hold that defendant~' experts may not testify to appraisals that value portion~ of the subject property separately from the whole.

## CONCLUSION

The certified auestions are answered, and the cause remanded for further proceedings.

HOLDRIDGE, PJ., and SCHMIDT, J., specially concurring.

PRESIDING JUSTICE HOLDRIDGE, specially concurring:

The doctrine of stare decisis requires this court to follow the "unit rule" where a partial taking occurs. For that reason, I concur in the majority's answer to the certified question. Iwrite separately in the hope that our supreme court would revisit this issue.

The unit rule, first articulated in Illinois in 1873, requires that the value of the property taken be determined, not based upon its own value, but only as a part of the whole tact held by the landowner. Page v. Chicago. Milwaukee & St. Paul Railroad Co., 70 Ill. 324, 327-~8 (1873); see also, Chicago & Evanston Railroad Co v. Blake, 116 Ill.~ 163, 168-69 (1886).

As the majority notes, the unit rule generally prohibits land, in partial takings, from being valued differently and separately from the whole. Forest Preserve District of Cook County v. Wing, 305 Ill. 194, 196 (1922). I am aware of no authority to establish that our supreme court has ever departed from the unit rule.

According to the majority, the Second District of the appellate court "extended" the unit rule in Department of Transportation v. HP/Meachum Land Limited Partnership, 245 Ill. App. 3d 242 (1993), to "allow for certain partial takings to be valued separately if there are clearly cognizable different highest and best uses for the land." (opinion, p. 6). I disagree with this characterization of HP/Meachumn as a "narrow exten-

sion" of the unit rule. Focusing on the differing values of wetland and non-wetland throughout the entire parcel and noting that the taken parcel contained almost no wetland, the HP/Meachum, court held that application of the "unit rule" misrepresented the true value of the specific portion taken. HP/Meachum, 245 Ill. App. 3d at 254. The court then allowed valuation of the taken parcel in a manner which departed from the fun.damental principle of the "unit rule" i.e., "price per acre or price per square foot of the entire parcel". HP/Meachum, 245 Ill. App. 3d at 254. In clear contravention of the "unit rule" the HP/Meachum court held that "when the highest and best use of the property is not uniform throughout the tract in question, an appraiser may testify to the highest and best uise for the different portions of the full tract. involved." HP/Meachum,. 245 Ill. App. 3d at 256. In other words, the HP/Meachum court, departed from the unit rule, I would characterize a departure from a rule as an "exception" to, not an extension of, that rule.

In the instant matter, the evidence clearly established that the highest and best use of the property was not uniform throughout the tract in question. Evidence established that there were tracts of commercial, residential, agricultural and wetlands throughout the whole tract. Reading HP/Meachuxn as an exception to the unit rule, I would hold that, where itis possible to differentiate the value of the land to be taken from the whole of the parcel, an appraiser may testify to the value of the different portions of the parcel, including the parcel to be taken.

The purpose to be accomplished in condemnation

proceeding is to provide "just compensation" to the landowner as determined by the the fair cash market value of the property at its highest and best use. City of chicago v. Anthofly, 136 Ill. 2d 169 (1990). The "unit rule" almost never achieves that purpose. Simply put, the "unit rule" ignores realities of land valuation and should give way. The approach articulated in HP/Meachum, is not an extension of the unit rule, but an exception that should be allowed to swallow up the rule. Our supreme court should revisit the issue.

SCHMIDT, J., joins in this special concurrence.

**SUPREME COURT OF ILLINOIS**
**CLERK OFTHE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 24, 2004

Mr. John E. Peterson
Peterson Law Office, P.C.
1109 Eastern Avenue
Plainfield, IL 60544-1006

No. 99235 - Department of Transportation, etc., respondent, v.Mary A. Kelley, etc., et al., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 16, 2004.

**STATE OF ILLINOIS**

3-06-0348

Dept. of Transportation **APPELLATE COURT**

V. Mary A. Kelley **THIRD DISTRICT**

**OTTAWA**

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord Two thousand seven, within and for the Third District of Illinois:

Present -

HONORABLE TOM M. LYTTON, Presiding Justice X

HONORABLE MARY W. McDADE, Justice X

HONORABLE MARY K. O'BRIEN, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

HONORABLE ROBERT L. CARTER, Justice X

HONORABLE DANIEL L. SCHMIDT, Justice

HONORABLE VICKI R. WRIGHT, Justice

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on June 1, 2007 the Order of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

App. 16

No. 3-06-0348

IN THE
APPELIATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2007

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,

Plaintiff-Appellee,

v,

MARY A. KELLEY, as Trustee
under a Trust Agreement dated
the 1st day of July, 1975, and
known as Trust Number 1, and
UNKNOWN OWNERS,

Defendants-Appellants.

Appeal from the Circuit Court
of the 12th Judicial Circuit
Will County, Illinois

No. 00-ED-218

Honorable Amy Bertani-Tomczak and
James E. Garrison,
Judges, Presiding

## ORDER

Mary Kelley, as Trustee under a land trust, appeals from an eminent domain action in which the trial court awarded her $48,300 for approximately one acre of land in Will County. We affirm.

The Illinois Department of Transportation (IDOT) filed a complaint for condemnation against Kelley to acquire 1.047 acres of land for the purpose of widening an intersection in Plainfield. IDOT acquired the parcel in a quick take, and Kelley was awarded $48,300. IDOT then moved for an order fixing the "whole" for purposes of valuation to be the entire 296-acre farm. Prior to trial, IDOT moved to bar the testimony of Kelley's two expert witnesses on the ground that their appraisal methodologies violated the "unit rule" of valuation. The trial court denied IDOT's motions. IDOT filed an interlocutory appeal, and we reversed the trial court's order. Department of Transportation v. Kelley, 352 Ill. App. 3d 278 (2004) (Kelley I). Kelley's petition for leave to appeal to the supreme court was denied. Department of Transportation v. Kelley, 212 Ill. 2d 530 (2004)

The case was remanded, and a jury trial was held on March 6, 2006. Kelley attempted to call one of her expert witnesses. IDOT objected, citing our appellate court ruling, and the trial court granted IDOT's objection. A lengthy offer of proof was then made by Kelley with the expert testifying. Following that testimony, IDOT moved for a directed verdict of $48,300 based solely on the testimony of its expert witness. The court reserved its ruling until after the jury reached its verdict. The jury returned verdict for

$70,900. The trial court subsequently granted IDOT's motion and reduced the verdict to $48,300.

## ANALYSIS

On appeal, Kelley claims that the trial court erred in barring her expert from testifying regarding the value of the condemned parcel. IDOT responds that the "law of *the case" doctrine prohibits reconsideration of the issue in this appeal.

The "law of the case" doctrine holds that a question of law decided on a previous appeal is binding on remand in the trial court, as well as on the appellate court in a subsequent appeal. Martin v. Federal Life Insurance Co., 268 Ill. App. 3d 698 (1994). There are two exceptions to the "law of the case" doctrine. The first exception arises when a higher reviewing court, after the lower reviewing court's decision, makes a contrary ruling on the same issue. The second exception allows the reviewing court to depart from the doctrine of the law of the case if the court finds that its prior decision was "palpably erroneous," but only where the appellate court has remanded the case for a new trial. Martin, 268 Ill. App. 3d at 701.

Illinois caselaw does not explicitly defines the term "palpably erroneous." Taken separately, both words have generally accepted connotations. "Palpable" is defined as easily perceptible, readily visible, noticeable, plain, distinct, obvious, or manifest. People v. Hucrhey, 382 Ill. 136 (1943). "Erroneous" means "deviating from the law." Black's Law Dictionary 562 (7th ed. 1999)

Here, the admissibility of Kelley's expert testimony was] raised in a prior appeal, and this court barred the improper valuation testimony of the appraisers as a matter of law. Kelley J., 352 Ill. App. 3d 278. On remand, the trial court was bound to follow this court's specific instructions. See Clemons v. Mechanical Devices Co., 202 Ill. 2d 344 (2002).

In her second appeal, Kelley cannot point to any intervening change in the law that would demand a different result. The only issue she raises is that this court's prior determination requiring use of the unit rule was palpably erroneous. We disagree.

A partial taking occurs when only a portion of a whole tract is taken by eminent domain. City of Springfield v. West Koke Mill Development Corp., 312 Ill. App. 3d 900 (2000). The Illinois Supreme Court has long held that the unit rule must be applied when determining the value of property in partial takings. Forest Preserve District of Cook County v. Wing, 305 Ill. 194 (1922); Page v. Chicago. Milwaukee & St. Paul Railroad Co., 70 Ill. 324 (1873). The unit rule prohibits smaller portions of a parcel from being valued differently and separately from the whole. Wing, 305 Ill.194; Department of Public Works & Buildings v. Lotta, 27 Ill. 2d 455 (1963).

In this case, we do not believe that our decision in Kelley I is "palpably erroneous" as that phrase is generally defined. We are aware of no authority that revokes the unit rule in Illinois. It can hardly be said that the application of a rule of law consistently stated by the Illinois Supreme Court since 1873 is an "obvious" or "manifest" deviation from the law.

Accordingly, we find no reason to declare our prior ruling palpably erroneous. The "law of the case" doctrine applies and bars relitigation of this tissue.

## CONCLUSION

The judgment of the circuit court of Will County affirmed.

Affirmed.

LYTTON, PJ., with CARTER, J., concurring and MCDADE, J., dissenting.

No. 3-06-0348

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2007

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,

Plaintiff-Appellee,

v,

MARY A. KELLEY, as Trustee
under a Trust Agreement dated
the 1st day of July, 1975, and
known as Trust Number 1, and
UNKNOWN OWNERS,

Defendants-Appellants.

Appeal from the Circuit Court
of the 12th Judicial Circuit
Will County, Illinois

No. 00-ED-218

Honorable Amy Bertani-Tomczak and
James E. Garrison,
Judges, Presiding

JUSTICE McDADE, dissenting:

The majority has found that the "law of the case"

doctrine bars relitigation of the issue of whether Kelley's expert witness may offer allegedly "improper valuation testimony." Slip order at 3. The majority believes that the expert's testimony violates the unit rule of valuation. I disagree. I find that the testimony would be consistent with the "unit rule" of valuation and does not conflict with this court's earlier decision in *Kelley I* Therefore, I would hold that (1) the "law of the case" doctrine does not bar this court from deciding the issue and despite this court's apparent ruling in *Kelley II* the trial court erred, albeit innocently, in denying Kelley's proffered testimony.

The majority, as did the *Kelley I* court, relies on *Forest Preserve District of Cook County v. Wing*, 305 III. 194 (1922), for the long-standing proposition that "[tihe unit rule prohibits smaller portions of a parcel from being valued differently and separately from the whole." Slip order at 4, citing Wing, 305 Ill. 194. When we rely on only the preceding sentence, it appears that Kelley's proffered testimony violates the unit rule. If, on the other hand, we examine the context and reasoning resulting in that holding in that case, rather than mechanically applying that single sentence as a rule of law affecting landowners' rights across the state, I believe our decision in this case would be different.

In Wing, the circuit court "excluded appellant's evidence of the sale of [one] acre lots in subdivisions located about a mile north of the tract [to be taken]." Wing, 305 Ill. at 195, 137 N.E. at 140. The supreme court stated the rule that "[p]roof of voluntary sales of lands in the vicinity and similarly situated is *properly received* to aid in estimating the value of the land to

be taken" (*Wing*, 305 Ill. at 195-96, 137 N.E. at 140) but held that the circuit court properly excluded the appellants' evidence because "the evidence excluded pertalned to tracts that were *not fairly similar* but which had been subdivided and were now on the market for residence purposes." (Emphases added.) *Wing*, 305 Ill. at 196, 137 N.E. at 140. After noting that "[a]ppellant was permitted to prove the fair cash market value of the land actually takenfor the most profitable use to which it was adapted, accordingto her theory," (emphasis added) (Wing, 305 Ill. at 196, 137 N.E. at 141) the court went on to hold as follows:

> "For the same reason it was not error to refuse to allow the witnesses to testify as to the number of tracts into which the premises could be divided, and the market value of acre holdings of from one to seven acres in extent. Compensation must be estimated for the land as land, with all its capabilities, and its best uses are to be considered, but they cannot be valued separately." (Emphasis added.) Wing, 305 Ill, at 196, 137 N.E. at 141, citing Forest Preserve District v. Caraher, 299 Ill. 11, 132 N.E. 211 (1921).

In *Wing*, the land was irregularly divided by the DesPlaines River. Eleven acres were wooded and unimproved, and the low lands were subject to overflow from the river into which a sewer emptied. *Wing*, 305 Ill, at 195-96, 137 N.E. at 140. Although the *Wing* court also held that the circuit court "did not err in refusing to allow proof of the value of the strip east of the river separate from the other land" (*Wing*, 305 III. at 196, 137 N.E. at 141) it did so because the proof

involved "a detailed analysis" likely to confuse the jury; not because the evidence was inadmissible. See *Wing*, 305 Ill. at 197, 137 N.E. at 141 ("To allow witnesses to enter into a detailed analysis of items pertaining to the value usually leads to the results that required a reversal in Caraher"), relying on Caraher, 299 Ill, at 15-16, 132 N.E. at 212 ("Evidence of sales of property which is not similar to the land to be taken can only lead to the investigation of numerous collateral issues and would certainly tend to mislead the jury; "such evidence could only tend to mislead the jury;" "the inevitable effect of such testimony as was admitted would lead to all sorts of collateral issues *** which would be confusing in the extreme").

The court supported its holding excluding the evidence by specifically noting as follows:

> "If its location made it available as frontage for the lots east of the river that may have added to the value of the tract, and appellant would, of course, be entitled to such value, but such fact does not require the value to be proved separately. *Denial by the court of such separate proof [in this case] does not mean that appellant did not receive the full value of the acre east of the river at its value for frontage or riparian purposes, such value being necessarily reflected in the price fixed by the witnesses who testified as to the value of the whole tract.* In support of her theory appellant offered evidence on the trial that the acre tract was available for such use and one of her witnesses testified that he considered such use in fixing

> the value placed by him on the tract as a whole. It is therefore plainly apparent that she received the benefit of this proof" (Emphasis added.) Wing, 305 Ill. at 196-97, 137 N.E. at 141.

Thus, in *Wing*, appellants wanted the land valued not just as it existed then, but as land "now on the market for residence purposes." Wing, 305 LII. at 196, 137 N.E. at 140. At the time, no subdivision had been created on the tract to be taken and it was not on the market for residence purposes. This did not mean that the land could not be valued as having a highest and best use as a subdivision, only that the land could not be valued as if it were already being used as a subdivision. Hence the court's holding that "[c]ompensation must be estimated for the land as land, [not as an existing enterprise, even if such use is inevitable,] with all its capabilities." *Wing*, 305111. at 196, 137 N.E. at 141.

*Wing* does not prohibit testimony that land involved in condemnation proceedings has different highest and best uses. Nor does *Wing* prohibit testimony as to the value of the land to be taken based on combining different highest and best uses. It in fact requires it. Thus in *Wing* the court endorsed the same procedure defendants sought to follow here. In *Wing*, practically all of the subject property was on the west side of the river. *Wing*, 305 III. at 195, 137 N.E. at 140. But the appraiser valued the property based on the sale of a similar tract (similar to the west tract) within two miles of the subject property, and taking into consideration the value of part of the land east of the river with a different use. *Wing*, 305 Ill, at 197, 137 N.E. at

141. Here, defendants' appraiser similarly sought to testify as to the value of the whole tract based on use of only part of the property for commercial development.

I find further support for what I believe to be the Wing court's actual holding in its exclusive reliance on *Caraher*. There, the court similarly stated the rule in takings cases as follows: "The rule is that compensation must be estimated for the land as land, with all its capabilities, and if there is timber on it, or coal, oil or other minerals under the surface, they are to be considered so far as they affect the value of the land, but they cannot be valued separately." (Emphasis added.) *Caraher*, 299 Ill. at 17, 132 N.E. at 213.

In *Caraher*, the land to be taken, for use as a forest preserve, consisted of "about 122.73 acres of fertile, tillable land and 271 acres of forest, covered with native trees of good size and different varieties." *Caraher*, 299 Ill, at 13, 132 N.E. at 211. Over the forest preserve's objection, the circuit court permitted a professional forester in the lumber business to testify as a witness for the appellees. The forester testified "that he had made a cruise of the tract in question and gave the log scale measurement of the white oak, red oak, walnut, cherry, ash and hickory trees on this tract of land" and offered an opinion of the value of the timber on the property in question when the petition was filed. *Caraher*, 299 III. at 17, 132 N.E. at 213.

Although the expert claimed that his opinion was "directed to the value of the timber standing on the ground," the court found as follows:

> The testimony "was clearly the value of the product, deducting expenses and leaving the land as stump land, with no evidence what the stump land would be worth if denuded of the forest. The appellees had a right to prove what the land was worth taking account of the fact that there was valuable timber on it, but the evidence was directed as to what could be realized in setting up a saw-mill and sawing lumber and getting it to the market on the day the petition was filed, which, of course, was utterly impossible. * * * Trees were a component part of the land, and there was no justification for admitting evidence of what could be realized by separating the timber from the land as personal property."
>
> *Caraher*, 299 Ill, at 17, 132 N.E. at 213.

*Caraher* prohibited valuing the land as if it were a functioning saw-mill, but did not prohibit valuing the land based on the presence of the lumber. In *Wing*, the court prohibited valuing the land as a residential subdivision but did not prohibit valuing the land based on the use of the subject property for that purpose. Similarly, here, defendants do not seek to value any improvements on the land, which is all that *Caraher*, *Wing*, and, as I will discuss in a moment, *Department of Transportation v. HP/Meachum Land Limited Partnership*, 245 Ill. App. 3d 252, 614 N.E.2d 485 (1993), prohibit. Rather, defendants properly seek to have the land valued based on mixed highest and best uses, which has apparently been the immemorial law of this State:

"When the highest and best use of the property is not uniform throughout the tract in question, an appraiser may testify to the highest and best use for the different portions of the ftill tract involved. (*Department of Public Works & Buildings v. First National Bank*, 9 Ill. App. 3d 633, 636, 292 N.E.2d 487 (1973); see also *Department of Transportation v. Mullen*, 120 Iii. App. 3d 268, 281, 457 N.E.2d 1362 (1983); *Department of Public Works & Buildings v. Hufeld*, 68 Iii. App. 2d 120, 128, 215 N.E.2d 312 (1966).) This rule makes sense in light of the purpose of the 'just compensation' provision in the constitutions that "'the owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.'" *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74, 35 L. Ed. 2d 1, 7, 93 S. Ct. 791, 794 (1973), quoting *United States v. Reynolds*, 397 U.S. 14, 16, 25 L. Ed. 2d 12, 15, 90 S. Ct. 803, 805 (1970); *City of Chicago v. Farwell*, 286 Ill. 415, 421, 121 N.E. 795 (1918).) In addition, this rule does not conflict with the principle of valuing the portion taken as part of the whole and not as a separate parcel. The valuation of the part taken as part of the whole is designed to provide just compensation to the landowner where the land sought to be taken is of greater value when considered as part of the whole than if considered as a parcel by itself. *Tri State Park District v. First National Bank*, 33 Ill. App. 3d

> 348, 351, 337 N.E.2d 204 (1975); see also *Forest Preserve District v. Draper*, 387 Ill. 149, 157-58, 56 N.E.2d 410 (1944) (and cases cited therein)." HP/A'Ieachum, 245 Ill. App. 3d at 256, 614 N.E.2d at 488.

Despite my belief that Kelley's expert's testimony would not, therefore, violate the unit rule, I recognize that we are faced with apparent "law of the case" barring "the improper valuation testimony of the appraisers as a matter of law." Slip order at 3, citing Kelley I, 352 III. App. 3d at 278. However, my analysis leads me to conclude that Kelley I permits application of the unit rule as I believe it is defined by Illinois courts and, notably, codified in the Illinois Pattern Jury Instructions, neither of which bars the testimony propounded by Kelley's appraiser.

In Kelley I, we wrote that:

> "[n]ot every part of a tract will be as valuable as other parts, and different highest and best uses may be used in valuing the tract as a whole. [Citation.] It may be proper to assign a highest and best use for one portion of the property and a different highest and best use for another. [Citation.] Numerous assignments of use for different parts of the land does not necessarily conflict with the unit rule because it allows the owner to be made whole; it is an equitable resolution to accurately valuing property with different highest and best uses. [Citation.]" *Kelley I*, 352 III. App. 3d at 281, 815 N.E.2d at 1217, citing *Department of Public Works v. Foreman State Trust and*

*Savings Bank*, 363 III. 13, 1 N.E.2d 75(1936), *Department of Public Works v. First National Bank of Joliet*, 9 Ill. App. 3d 633, 292, N.E.2d 487 (1973), *Tn-State Park District v. First National Bank of Cicero*, 33 III. App. 3d 348, 351, 337

N.E.2d 204 (1975).

Despite these long standing precedents, the Kelley I court ultimately rested its holding on *HP/Meachum*. We found that the *HP/Meachum* court "extended the unit rule to allow for certain artial takings to be valued separately *if* there are clearly cognizable different highest and best uses for the land." (Emphasis added.) *Kelley I*, 352 Ill. App. 3d at 281, 815 N.E.2d at 1217.

In our earlier application of the decision in *HP/Meachum*, we wrote as follows:

> "In partial takings where different portions of the property are recognizably distinct from each other, the different portions may be valued separately from each other. [Citation.] HP/Meachum involved a partial taking where the whole tract included wetland and non-wetland acreage. IDOT sought to take a portion which was composed primarily of buildable, non-wetland property, but which also contained a small percentage of the non-buildable,wetland property. [Citation.] The court found that strict application of the unit rule would misrepresent the true value of the specific portion taken because the recognizably distinct wetland portion was of little

> value when compared to the buildable, non-wetland property. [Citation.] The court permitted a *narrow* extension of the unit rule because it recognized the substantial differences in value between the wetland and non-wetland property; each was easily identifiable and uniform within their respective portions. Cf *City of Springfield v. West Koke Mill Development Corp.*, 312 III. App. 3d 900, 904, 728 N.E.2d 781 (2000) (holding that land which includes highway easement and accompanying dralnage ditch may be valued lower than farmland in the same whole)." (Emphasis added.) Kelleyl, 352 111. App. 3d at 28 1-82,
>
> 815 N.E.2d at 1217-18.

We distinguished the instant case from HP/Meachum on the grounds that:

> "the ******* do not provide the same clearly delineated boundaries. Even the defendants' appraisers could not agree as to where one "zone of use" began and another ended. The state's appralser, on the other hand stated that the only highest and best use of the whole property was mixed-use development." *Kelley I*, 352 Ill. App. 3d at 282, 815 N.E.2d at 1218.

Ultimately, we held that "when different uses of the property are easily delineated, a separate valuation may be appropriate" but no compelling reason to abandon the unit rule presented itself in this case.

Kelleyl, 352 Ul. App. 3d at 282, 815 N.E.2d at 1218.

But in HP/Meachum, the court specifically found that its holding was not inconsistent with Illinois Pattern Jury Instructions, Civil, No. 300.44 (3d ed. 1990) (hereinafter WI Civil 3d No. 300.44), which states as follows:

> "In arriving at the fair cash market value of the property taken, you should determine its value considered as a part of the whole tract before the taking and not its value as a piece of property separate and disconnected from the rest of the tract." WI Civil 3d No.
>
> 300.44.

The court held that the State's reliance on WI 300.44 for its argument that the appraiser must determine the value of the whole property and apply that value to the part taken as part of the whole was misplaced because the owner did not seek to value the part of the whole tract taken separately from the remainder of the tract. "Rather, it seeks to have the recognizably distinct wetland portions of the tract valued separately from the nonwetland portions, and the property to be taken, which includes both types of land, valued with reference to its specific share of the value of the whole tract." The court held that method of valuation was "consistent with instruction No. 300.44." HP/Meachum, 245 Ill. App. 3d at 255-56, 614 N.E.2d at 487-78. Moreover, the HP,Meachum court distinguished previous cases where "the appraisers valued the land separately from the improvements thereon and did not appraise the value of the land as land." Here, by contrast, the valuation at issue is the

value of the land as land." *HP/Meachum*, 245 III. App. 3d at 255-56, 614 N.E.2d at 487-78.

Although *Wing* did not involve a partial taking, it does squarely address the issue of whether valuing the land based on differing highest and best uses is appropriate. In both *Wing* and *HP/Meachum*, the court allowed the land to be valued as land based on mixed highest and best uses. See Wing, 305 III. at 195-96, 137 N.E. at 140-41 (for subdivision and use and use as a frontage for a subdivision); *HP/Meachum*, 245 Ill. App. 3d at 255, 614 N.E.2d at 488 (wetland and non-wetland). Neither Wing or *HP/Meachum* discussed any alleged difficulty in delineating those different uses. Because it relies exclusively on *HP/Meachum*, which in turn relied on *Wing* and *Caraher*, I would find that the holding in *Kelley* I merely prohibits, consistent with the authority cited therein, valuing improvements or conditions on the land separately from the whole.

Thus, the actual holding in *Kelley I*, "that defendants' experts may not testify to appraisals that value portions of the subject property separately from the whole" (*Kelley I*, 352 Ill. App. 3d at 282, 815 N.E.2d at 1218) does not prohibit the use of separate highest and best uses in valuing the land. That method of valuation is in fact consistent with both *Wing* and *HP/Meachum* in that, as demonstrated above, defendants do not seek to value portions of the subject property separately from the whole within the meaning of the authority cited in *Kelley I*.

Alternatively, I would find that *Kelley I* is palpably erroneous, but only so far as it suggests that

HP/Meachum represents either a 1) narrow extension or 2) broad exception to the unit rule.

Courts have defined when a decision constitutes a "clear break with the past." See *People v. Seats*, 121 Ill. App. 3d 637, 639, 460 N.E.2d 110, 112 (1984). It is said that a decision constitutes a clear break with the past when "the court explicitly overrules its own past precedent,disapproves a practice it had previously sanctioned, or overturns a well-established body of lower court authority." *Seats*, 121 111. App. 3d at 639, 460 N.E.2d at 112. The *Kelley I* court did not explicitly overrule the long line of precedent allowing an appraiser to value part of the subject property differently, based on a different highest and best use, than the remainder of the property; nor did it expressly disapprove that practice.

The certified questions presented in Kelley I were:

> "Question I: Whether in a partial taking eminent domain action the Defendant's expert Sheridan should be barred from testifying pursuant to the Illinois Unit Rule because his appraisal values the part taken at a different value per square foot than other areas of the whole parcel. Further, if Mr. Sheridan is not barred from testifying, may he be cross examined regarding the unit rule and his breaking down the area of the whole into different values per square foot pursuant to the Federal Rules of Evidence 703 and 705 and *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).
>
> Question II: 'Whether Defense expert Brorsen should be barred from testifying where all

> expert witnesses agree the highest and best use of the whole is mixed use development,' and where the Defendant's expert Brorsen bases his opinion of value on an alleged modem trend in appraising real estate called the "Larger Parcel Theory" which divides the whole into three "zones of use" according to his opinion of "highest and best use." Further if Brorsen is not barred from testifying, whether such testimony is admissible pursuant to the unit rule and subject to cross examination under the Federal Rules of Evidence 703 and 705 and *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981)." *Kelley I*, 352 III. App. 3d at 280, 815 N.E.2d at 1216.

Despite purporting to answer the certified questions, which would have squarely addressed whether "appraisal values [of] the part taken [could be determined based on] a different value per square foot," and whether "testimony is admissible" as to the highest and best use of "three 'zones of use,'" the Kelley I court instead answered a "general issue: in a partial taking eminent domain action, does the unit rule of valuation prohibit appraisers from valuing portions of the whole differently and separately from the whole?" Kelley I at no time said that appraisers may not apply a different value per square foot to portions of the property, or that that value per square foot should not be based on different highest and best uses for the subject property. Rather, relying exclusively on *HP/Meachum*, the court merely held that portions of the subject property may not be valued separately from the whole.

*Kelley I* therefore constitutes nothing more than a judicial construction of the term "separately" as used in takings cases. Further, the Kelley I court must have meant its holding to interpret the term "separately" consistently with the authority cited therein. Specifically, appraisers may not "value[] the land separately from the improvements thereon and * * * [must] appraise the value of the land as land." *HP/Meachum*, 245 Ill. App. 3d at 255-56, 614 N.E.2d at 487-78. Consistent with that holding, nothing in Kelley I prohibits defendants' appraisers from testifying based on different values per square foot of the subject property based on different highest and best uses. This court merely engaged in a judicial construction of the meaning of valuing the land "separately."

The trial court, and now the majority, has failed--understandably in my opinion--to properly apply our earlier decision based on its limited scope. However, after careful examination of both the unit rule and the decision in Kelley I, I believe the law of the case doctrine does not bar consideration of the issue of the appraiser's testimony, nor does it bar us from holding that he may testify that the highest and best use of the west 80 acres was commercial while the remainder of the subject property had a different highest and best use, and may offer his opinion of the value of the property taken based on the highest and best use of the west 80 acres. Compare *Marsaw v. Richards*, 368 Ill. App. 3d 418, 426, 857 N.E.2d 794, 800 (2006) ("We do not find the 'law of the case' doctrine to bar our current consideration of the trial court's rulings because in the

previous appeal of this case, we determined that the

trial court needed to make factual findings").

Accordingly, I respectftilly dissent.

STATE OF ILLINOIS,

APPELLATE COURT, ) ss.

THIRD DISTRICT

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court a Ottawa, this 1st day of June in the year of our Lord two thousand seven.

---

/s/ Clerk of the Appellate Court

**STATE OF ILLINOIS**
**THIRD DISTRICT APPELLATE COURT**

GIST FLESHMAN
Clerk of the Court
815 434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815 434-5068

Be it remembered, That, to wit: On the 6th day of July, 2007, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-06-0348

| | |
|---|---|
| Department of Transportation State of Illinois, Appellee, v. Mary A. Kelley, Appellant. | APPEAL FROM: Will County Hon. Amy Bertani-Tomczak Hon. James Garrison 00 ED 218 |

Now on this day this cause coming on for hearing upon the petition for rehearing filed by the Appellant, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied. Application for Certificate of Importance pursuant to Rule 316 is also denied.

Justices Lytton and Carter concur in the denial of the petition for rehearing. Justice McDade would grant the petition for rehearing.

---

/s/Clerk of the Court

104965

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

September 26, 2007

Mr. John. E. Peterson
Peterson Law Office, P.C.
14705 S. Eastern Avenue
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Plainfield, IL 60544-1006

No. 104965 - Department of Transportation, State of Illinois, respondent, v. Mary A. Kelley, etc., et al., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 1, 2007.

STATE OF ILLINOIS )
) SS.
COUNTYOF WI LL )

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

DEPARTMENT OF TRANSPORTATION, STATE OF ILLINOIS,
Plaintiff,
-vs -

No. 00 ED 218

MARY A. KELLEY, as Trustee, et al.,
Defendants.

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable JAMES GARRISON, one of the Judges of said Court, on the 7th day of February, 2003 at the hour of 9:00 a.m.

PRESENT:

MR. ROBERT W. FIORETTI and
MS. SARA D. LUND
Chicago, Illinois
Appeared on behalf of the Plaintiff;

MR. JOHN E. PETERSON
Peterson Law Office
Plainfield, Illinios
Appeared on behalf of the Defendants.

limine and in fact, one of the ways -- one of the things I think I could have done was to allow the motion in limine as to Appraiser Sorenson and deny it as to -- I forget the other gentleman's name.

MS. LUND: Sheridan and Brorsen.

MR. FIORETTI: Sheridan and Brorsen.

THE COURT: Brorsen, deny it, because he used the semantically more close to. a violation of the rule as opposed to the other gentleman who recognized at his deposition that you are supposed do it a certain way as a whole and then gave greater weight to the area of the property that was being taken and adding it to the commercial, the commercial potentially developed property, and that is where the one and a half to two acres was being taken from and therefore he gave greater weight to the square footage, paid the higher value to square footage. I think that that is a much closer question in terms of whether or not it violates the rule as written, but I thought that under the modern trend, and I can't see how you could possibly take into consideration fair market value of a multiple use or mixed use property when by not taking -- by not breaking it down into its zones of value, it seems to me that that would deny the defendant, Mrs. Kelley, fair -- just compensation as required by the constitution and the law; however, I also agree that this is a very, very novel question and could easily be interpreted the other way. And for that reason I felt that it would be appropriate if there is somebody who wanted to, and T recall both sides said they probably were going to appeal or ask for a 308 appeal or finding in this case, and I'm very

susceptible and amenable to entertaining such a request.

MR. FIORETTI: And we do have that motion.

THE COURT: Okay.

MR. PETERSON: Can I comment?

THE COURT: You may comment.

MR. PETERSON: Judge Bertani's ruling is the basis of going with this. We wanted -- if you've read the material, you know what is called a larger parcel of the whole.

THE COURT: The concept.

MR. PETERSON: The appraisal concept.

THE COURT: Right.

* * *

persuasive and two or three other cases I cited after that that also said it's appropriate to take into consideration the various parts of the whole 290 acres in this case that are -- have different uses and different purposes and are therefore a higher value or lesser value.

MR. PETERSON: Let me explain my logic. I obtained from the Appraisal Institute what is called the Federal Rules of Appraisal. It's a yellow book. I also got this book, Eaton on eminent domain and litigation. It's a new concept, new book. It's kind of -- I think it's going to become the national text. Anyway, they say it's the appraiser, the appraiser who has the duty -- or has the expertise to find the whole; in other words, it's the opinion of the ap-

praiser.

Now my argument is going to be this. If it's the opinion of the appraiser, expert opinions are given to find facts. The finder of fact ultimately of the underlying facts leading to the fact of the verdict is supposed to be the jury. In this case, in an eminent domain case,[there is a constitutional right, and one of my arguments would be --

* * *

what the taking is and what the whole from which the taking is to be, without the remainder issue should be a question of fact for the jury constitutionally in reading those books and that is the new -- That is really the new point that would be taken up in the appeal is who should do that and I have jury instructions drafted and everything.

THE COURT: I understand.

MR. FIORETTI: Judge, and the only --

THE COURT: I disagree with your position.

MR. FIORETTI: And I just -- I'm going to say, that there is some very limited minority of states based upon that -- long standing, what we view as emerging law is really not emerging law. It's been long standing in some of the minority states that adopt this view and on that -- be that as it may, it's all statutory on a lot of this depending on the states.

THE COURT: I think it's clear in Illinois that the whole -- what is the whole is a legal determination, a question of law, and I don't I wouldn't certify that under 308.

MS. LUND: Thank you, Judge.

No. 3-03-0282

**In the**

**Appellate Court of the State of Illinois**

**Third Judicial District**

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,
Plaintiff-Appellant,

V.

MARY A. KELLEY, as Trustee under a Trust Agreement dated the jit day of July, 1975 and known as Trust Number 1, and 1JNI~OWN OWNERS,
Defendants- Appellees

Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
No. OO ED 218

Honorable Amy Bertani-Tomczak and
James E. Garrison, Presiding Judges

# BRIEF AND ARGUMENT FOR DEFENDANTS - APPELLEES

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**ORAL ARGUMENT REQUESTED**

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## POINTS AND AUTHORITIES

### I

**EXPERT APPRAISAL WITNESSES MAY OPINE THAT DIFFERENT PARTS OF THE PROPERTY HAVE DIFFERENT HIGHEST AND BEST USES AND DIFFERENT VALUES**

Department of Transportation vs. H.P./Meachum Land Ltd Partnership, 245 I11.App. 3d 252, 614 lOe 2d 485, il1.App. 2 Dist (1993)

Department ofPublic Works: buildings v. Oberlaender, 92 Ill.App. 2d 174,235 N.E. 2d 3 aff'd (1969), 42 Ill.2d 410, 247 N.E. 2d 888

### II

**AN APPRAISER MAY TAKE INTO CONSIDERATION MANY FACTS WHEN MAKING AN APPRISAL THAT MAY NOT BE ADMISSIBLE IN EViDENCE**

Righeimer, Eminent Domain in Illinois, First Edition, 1962.

Righeimer, Eminent Domain in Illinois, Third Edition, 1986.

### III

CROSS EXAMINATION OF MR. BRORSEN AND MR. SHERIDAN

## SUPPLEMENTAL STATEMENT OF FACTS

It is difficult to understand the present status of this case without knowing in detail what transpired in the trial court.

There was a quick take hearing to determine preliminary just compensation before Honorable Judge Amy Bertani-Tomezak. Plaintiffs valuation witness was Charles Southcomb. Defendant's valuation witness was Arthur Sheridan. The award was the exact figure Mr. Southcomb opined to the great disappointment of the defendant. At that point, defendant hired a new appraiser, Andrew Brorsen. His first appraisal report (found at Voll C 166) dated June 20, 2001 appraised only the west 80 acres of the Kelley farm because he determined according to appraisal standards methodology and conventions, that only the west 80 acres should be considered the "larger parcel" or the "whole" from which the part taken is taken (Vol.1 C 190)

The plaintiff then filed a motion asking the court to determine the "whole" to be the entire 289 acr~ Kelley farm. After much legal argument and briefing, Judge Amy Bertani-Tomczak ordered that the entire 289 acres be considered the "whole" or "larger parcel" for the purpose of these proceedings. (Vol. 3 R 18)

Thereafter, the defendant asked appraisers Brorsen and Sheridan to prepare new appraisals in compliance with that court order. (Vol. 3 R 27) Appraiser Brorsen's revised appraisal dated February 1, 2002 is found in Vol. 1 C-54 thru 165.

While neither the appraisal report or the quick take testimony of plaintiff's appraiser, Charles Southcomb, is in the record, his appraisal is alluded to throughout

the record sufficiently to glean its contents. Mr. Southcomb opined the highest and bestuse was one use throughout the entire 289 acres he called "mix use" (Vol.3 R18) He extrapolated his comparable sales data into a value for the entire 289 acres then divided that figure by 289 to arrive at "one unit value per acre" which he says is his opinion of value of the part taken as part of the whole. (Vol 3 R60-62) (Vol. 3 R66) This is referred to in this brief as "size regression".

Note: Since no appeal is taken at this time of Judge Bertani-Tomczak's order fixing the "whole" or "larger parcel" at 289 acres, there will be little or no reference to the modem "larger parc~l" theory of valuation in eminent domain cases. However, for informational purposes, I have made an appendix to this brief with excerpts from certain literature about the "larger parcel" theory of appraisal.

## ARGUMENT

### I

### EXPERT APPRAISAL WITNESSES MAY OPINE THAT DIFFERENT PARTS OF THE PROPERTY HAVE DIFFERENT HIGHEST AN]) BEST USES AND DIFFERENT VALUES

The Kelley property is a 289 acre farm bordered on the west by Route 59, on the north by 1 27th Street and on the east by the DuPage River and its wetlands. Route 59 is a rapidly expanding commercial highway with numerous "big box" shopping centers, either

sited, under construction or planned. A major shopping center anchored by a Target Department Store is directly across the street. A quarter mile south is a new Jewel-Osco Food Center. Also within the area on Route 59 are planned a Menards Building Supply Center, A Wal-Mart Store and a Meijer Store. Obviously the west part of the Kelley farm along Route 59 is prime commercial real estate.

The pattern of development in the area set back from the commerical area along Route 59 is residential development tract subdivisions. The only unique area of the property is the site of defendant's new home, which because of its size and cost needs a ten acre "estate lot" to support and hold its value. All one has to do is look at the Comparable Sales data in the Second Brorsen appraisal to see there are vast differences in the values of the three use parcels. (Vol 1: C90 Commercial Sales; C94 Subdivision Sales; C107 Estate Sales)

This case is very similar to the Meachum Case (Department of Transportation vs. H.P./Meachum Land Ltd Partnership 245 Ill.App. 3d 252 614 lOe 2d 485, Ill.App.2 Dist 1993) Following *Department of Public Works: Buildings v. Ober/aender*, 92 lll.App. 2d 174,235 N.E. 2d3 aff'd(1969), 42111. 2d410, 247 N.E. 2d 888, the court said:

> "When the highest and best use of the property is not uniform throughout the tract in question, an appraiser may testify to the highest and best use for the different portions of the full tract involved. . . . This rule makes sense in light of the purpose of the 'lust compensation" provision in the constitutions that" '[t]he

> owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. . ...In addition, this nile does not conflict with the principle of valuing the portion taken as part of the whole and not as a separate parcel. The valuation of the part taken as part of the whole is designed to provide just compensation to the landowner where the land sought to be taken is of greater value when considered as part of the whole than if considered as a parcel by itself"
>
> Here, the State seeks to take a portion of the full tract that includes a larger percentage of buildable, nonwetland property than does the tract as a whole. Consequently, the application here of the State's proposed rule, that an appraiser must offer only one valuation considering the total value of the entire parcel, would misrepresent the value of the specific land portion to be taken. We find that that rule does not follow the law of this State and, thus, that the court's denial of the owner's first motion was in error."

In this case, both of the defendants appraisers recognized that the commercial portion of the Kelley farm has a higher value than the remainder. They each identifled that part of the Kelley property with highest and best use of commercialuse precisely as in Meachum and they assigned a specific value to that part precisely as in Meachum.

The plaintiff, IDOT, tries to make an artificial distinction between Meachum and this case arguing the Meachum appraiser depended on physical charac-

teristics in the property when deliniating zones of highest and best use and different values. However, other factors can also determine zones of highest and best use, especially development trends in the immediate area. The plaintiff cites no authority that physical characteristics can be the only determining factor when defining zones of highest and best use. Obviously, the experts think otherwise for good cause.

II

**AN APPRAISER MAY TAKE INTO CONSIDERATION MANY FACTORS WhEN MAKING AN APPRAISAL THAT MAY NOT BE ADMISSIBLE IN EVIDENCE**

Appraisal reports are made for many different purposes, including negotiating settlements in eminent domain cases. A brief review of both Brorsen appraisals (June 20, 2001 and Februai~y 1, 2002) show each is highly detailed, accurate and supported by a great deal of data, and professional expertise and discusses the "larger parcel" theory in detail.

It has long been recognized and understood that there is or can be a big difference between the contents of an appraisal and the facts and opinions drawn therefrom presented to a jury.

> "Although most appraisers and opinion witnesses as to the value of real property arrive at value in their own minds and in their secret computations by adding to the value of the land figured on a front foot or square foot basis the value of the improvements thereon figured at replacement cost less depreciation, such

separate elements of value are not admissible in evidence in illinois in fixing the market value of an improved piece of property."

Righeimer, Eminent Domain in Illinois, FirstEdition, 1962, at page 47.

"Although most appraisers and opinion witnesses as to the value of improved real property arrive at value in their own minds and in their secret computations by adding to the value of the land figured on a front foot or square foot basis the value of the improvements the on figured at replacement cost less depreciation, such separate elements of value are not admissible in evidence in Illinois in fixing the market value of an improved piece of property."

Righeimer, Eminent Domain in Illinois, third Edition, 1986 at page 146.

"This rule does not of course preclude the witness from taking into consideration in his testimony the value of the improvements and any other items which go to make up the market value of the property for its highest and best use. It merely means he cannot break down, and testify separately as to these separate items.

The rule that the witness must testify to the value of the whole does not mean, however, that he must give the same proportionate value to every part of the whole. One part of a piece of property may have more value than another part. Thus the front one-third of a building, which includes the heating plant,

offices, etc, may have a value greater than the rear one-third which is simple storage space, and it also may have a value greater than one-third of the whole."

Righejiner, Eminent Domain in Illinois, Third Edition, 1986, at page

148.

"This rule does not of course preclude the witness from taking into consideration in his testimony the value of the improvements and any other items which go to make up the market value of the property for its highest and best use. It merely means he cannot break down and testify separately to these separate items.

The rule that the witness must testify to the value of the whole does not mean, however, that he must five the same proportionate value toe very part of the whole. One part of a piece of property may have more value than another."

Righeimer, Eminent Domain in Illinois, First Edition, 1962, at page 48.

The plaintiff makes a quantum leap to assume defendant's appraisal experts will testify word for word from their reports or as they testified in their discovery depositions. It is and has always been our intent to confine Mr.Brorsen's and Mr. Sheridan's testimony before the jury to the Unit Rule as refined by case law, such as Meachum. We plan to use the customary before and after method of direct examination. Direct examination will proceed like this: After

the appraiser's testify to the usual facts, qualifications, description of the property and surrounding area, comparable sales, highest and best use, the following critical questions will be asked:

Do you have an opinion of the value of the whole 289 acres before the taking?

Do you have an opinion of the value of the whole 289 acres after the taking?

Do you have an opinion of the value of the part taken as part of the whole?

Answer: (The difference between the answer to the first question and the answer to the second in dollars.)

What is the basis for your opinion?

Answer: Because the part taken is in the area of highest and best use for commercial uses.

The defendant's witnesses will not break down values for each area of highest and best use nor add them together in front of the jury. They will not discuss appraisal theories such as the "larger parcel" theory.

In this manner, defendant will confine her expert's testimony before the jury within the limitations of the Unit Rule and the Meachum Case hopefully to produce a fair result without error.

## III

## CROSS EXAMINATION OF MR. BRORSEN AN]) MR. SLIERJDAN

The defendant does not contest or even suggest the plaintiff not have great latitude in cross examining her appraisal witnesses. In fact, we believe the more plaintiff does so, the weaknesses of Mr. Southcomb's testimony will be exposed to the jury. However, plaintiff should not be heard later to complain about the foolishness of its own conduct or complain the Unit Rule was broken, when it has opened this Pandora's box itself.

## CONCLUSION

What makes this case unique is that the plaintiff, IDOT, attacks the defendant's appraisers before trial. Why did not the plaintiff, IDOT, make a motion in hrnine or ask for an offer of proof or voir dire outside the jury? Why did IDOT wait until the eve of trial to make its motion to bar? Because IiDOT does not want Kelley's appraisers to appear in court opposite IDOT's appraiser, Mr. Southcomb. Why? Answer: "size regression".

> "Size regression is the basic economic principle that as the number of units of a commodity increases, the price per unit paid for the commodity decreases. It is the concept of the bulk sales discount. As applied to land, as the number of units (e.g., acres, square feet) in a tract of land increase, the price or value, per unit tends to decrease. Common sense tells us that a larger tract of land, holding other fac-

tors equal, would sell for less per unit. . ..

Appraisers are will aware of size regression. In fact, a favorite technique of the biased (and unethical) appraiser who is attempting to support a high value estimate is to compare the prices paid per acre for small tracts against the price of a substantially larger subject parcel without making a size adjusiment. Conversely, the biased appraiser attempting to support a low value will compare the prices paid per acre for large tracts against a small tract under appraisal without making a size adjustment."

Lake, Real Estate Valuation in Litigation, Appraisal Institute, 1995, at

page 88.

Remember in the Meachum case, a second question was certified to wit:

"Whether an expert appraisal witness in a partial-take eminent domain action is required to determine a unit value (price per acre or price per square foot) for the whole property, and then required to apply that same unit value to the part take, regardless of the highest and best uses of various portions of the property and the condition of various portions of the property, including but not limited to the part to be taken?"

Meachutn, supra 245 ffi.App.254

The Appellate Court answered this question:

"The State responds that the appraiser must determine the value of the whole property and apply that value to the part taken as part of the whole. As authority for its position, the State first cites to Illinois Pattern Jury Instructions, Civil, No. 300.44 (3d ed. 1990) (hereinafter

IPI Civil 3d No. 300.44), which states:

"In arriving at the fair cash market value of the property taken, you should determine its value considered as a part of the whole tract before the taking and not its value as a piece of property separate and disconnected from the rest of the tract." WI Civil 3d No. 300.44.

We find that the State's reliance on this instruction is misplaced. The owner does not seek to value the part of the whole tract taken separately from the reminder of the tract. Rather, it seeks to have the recognizably distinct wetland portions of the tract valued separately from the nonwetland portions, and the property to be taken, which includes both types of land, valued with reference to its specific share of the value of the whole tract. We find that that end is consistent with Instruction No. 30044." Meachum supra at 256.

However, this does not mean IiDOT's appraiser at trial is forbidden from practicing size regression by applying a per acre unit value for the entire 289 acres to the part taken. We believe IDOT"S appraiser, Mr. Southcomb, will do precisely that if Mr. Brorsen and Mr. Sheridan are out of the way. That's plaintiff, DOT's,ultimate goal and the reason for this appeal.

Everything plaintiff, IDOT, and its attorneys have done in this case leads to one conclusion. IiDOT is intentionally attempting to re-institute "size regression" into eminent domain valuation process in partial take cases and overrule or at least avoid the effect of the Meachum case. They spin and twist the Unit Rule to fit their purpose. Hiring Mr. Southcomb and proferring his size regression appraisal; arguing the Unit Rule as the excuse at every opportunity in this case from the quick take to the motion to bar. Seeking to bar defendant's appraisers rather than making a motion in ilmine or asking for an offer of proof or vow dire. Who knows how many times IDOT has purchased land from unsuspecting lay persons by promoting this size regression scenario.

When making his ruling, Judge Garrison said:

> ". . ..1 can't see how you can . . .. or at least arrive at just compensation unless you allow the experts to give weight or to take into consideration the values of each of the mixed potential uses. . ."
>
> Judge Garrison R. Vol. 3 R.95.
>
> "...I can't see how you could possibly take into consideration fair market value of a multiple use or mixed use property when by not taking - by not breaking it down into its zones of value, it seems to me that would deny the defendant, Ms. Kelley, fair-just compensation as required by; the constitution and the law. . ."
>
> Judge Garrison R Vol.3 R 96-97.

In almost every Illinois eminent domain case, the courts chant:

> "The fifth amendment to the United States Constitution provides that private pioperty shall not be "taken for public use, without just compensation". (U.S. Const., amend. V.) Similarly, our State constitution provides that "[private property shall not be taken or damaged for public use without just compensation as provided by law."
>
> (Ill. Const. 1070, art. I, § 15.) "Just compensation" is determined by the fair cash market value of the property at its highest and best use"

Obviously compensation will not be just if the plaintift~ IDOT, having taken the defendant's land, gets away in court from paying fair value for it by use of these kind of shenanigans, especially in light of the current state of Illinois law. Make no mistake about it, this is an abuse that should be firmly dealt with by this Appellate Court.

MARY A. KELLEY, Trustee - Defendant

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No. 3-06-0348

**In the**

**Appellate Court of the State of Illinois**

**Third Judicial District**

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,
Plaintiff-Appellee,

V.

MARY A. KELLEY, as Trustee under a Trust Agreement dated the jit day of July, 1975 and known as Trust Number 1, and 1JNI~OWN OWNERS,
Defendants- Appellants

Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
No. OO ED 218

Honorable Amy Bertani-Tomczak and
James E. Garrison, Presiding Judges

# BRIEF AND ARGUMENT FOR DEFENDANT- APPELLANT

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**ORAL ARGUMENT REQUESTED**

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## POINTS AND AUTHORITIES

### I

### THIS APPELLATE COURT MAY RULE ON THE MERITS OF THIS CASE WITHOUT VIOLATING *STARE DECISIS*

*Department of Public Works and Buildings v. Foreman*, 363111 13 1 NE 2d 75 (1936);

*Department of Public Works: Buildings v. Oberlaender*, 92 IILApp.2d 174,235 N.E 2d 3 aff'd (1969), 42 I11.2d 410,247 N.E. 2d ggg*

*Department of Transportation v H.P./Meachum Land Ltd Partnership*, 245 111. App.3d 252, 614 N.E. 2d 4g5, I11.App.2 Dist (1993)

(A) Matters concerning the merits of the controversy between the parties which were presented to but not decided by the Appellate Court can be relitigated.

*Zokoych v. Spaulding*, 84 111. App. 3d 661,405 N.E. 2d 1220, 40 111.

Dec. 128 (1~ Dist. 1980).

(B) Prior appellate decision palpably erroneous can be raised again in a subsequent appeal. *Thomason v. Chicago Motor Coach*, 298 fil. App. 626,

*19 N.E. 2d 435 (1939)*.

II

**THE UNIT RULE AND THE LAGER PARCEL THEORY ARE TILE SAME ONIY TILE LATTER IS A REFINEMENT IN TILE EVOLUTION OF TILE FORMER**

*Department of Transportation v H.P./Meachum Land Ltd. Partnership*, 245 Il. App.3d 252, 614 N.E. 2d 485, Ill.App.2 Dist (1993);

*Department of Public Works. Buildings v. Oberlaender*, 92 Ili.App.2d 174,235 N.E 2d 3 aff'd (1969), 42 Ill.2d 410,247 N.E. 2d 888.

*Department of Transportation v. Mary A. Kelley*, __ IL. App.3d ____, 815 N.E. 2d 1214,287 IL.Dec. 411, I1l.App. 3rd Dist. 2004.

*Uniform Appraisal Standards for Federal Land Acquisitions* (5th ed. 2000)

*Lake, Real Estate Valuation in Litigation*, Appraisal Institute, 1995.

III

**BECAUSE OF "SIZE REGRESSION" DEFENDANT WILL NOT RECEiVE JUST COMPENSATION FOR HER PROPERTY**

1. Private property shall not be "taken for public use, without just compensation". The United States Constitution, amend V

2. "Private property shall not be taken or damaged for public use without just compensation as provided by law." ill. Const. 1970 art. I, § 1.5.

3. "Just compensation" is determined by the fur cash market value of the property at its highest and best use. *City of Chicago v. Anthony*, 136111. 2d. 169,174(1990).

4. 'The purpose ofjust compensation is to put the property owner in the same economic position as if no condemnation took place; it should not result in financial improvement or excess." IDOTv. Kelley - Opinion of Court - page 4. . .

5. "Not every part of a tract will be as valuable as other parts, and different highest and best uses may be used in valuing the tract as a whole." *Department of Public Works v. Foreman State Trust and Savings Bank*, 363 III. 13 (1936).

6. 'It may be proper to assign a highest and best use for one portion of the property and a different highest and best use for another". *Department of Public Works v. First National Bank of Joliet*, 9111. App. 3d 633 (1973).

7. "Numerous assignments of use for different parts of the land does not necessarily conflict with the unit rule because it allows the owner to be made whole; it is an equitable resolution to accurately valuing nronertv with different highest and best uses." *Tn-State Park District v. First National Bank of Cicero*. 33 IIL App. 3d 348, 351 (1975) IDOTv. Kelley - Opinion of Court - Pages 5-6.

8. J. D. Eaton, Real Estate Valuation in Litigation, Second Ed. (1995) Appraisal Institute.

## STANDARD OF REVIEW

Because all issues presented in this case are ones of law, the Standard of Review is de novo review.

## NATURE OF THE CASE

This is an action for eminent domain brought by the Plaintiff Department of Transportation, State of Illinois ("IDOT") against Defendants Mary A. Kelley, as Truste under a Trust Agreement dated the 1St day of July, 1975, and known as Trust Number 1 ("Kelley"), and Unknown Owners to acquire 1.047 acres of right of way and a temporary easement for the purpose of widening the intersection of Route 59 and 127~" Street in the Village of Plainfield, State of Illinois (designated parcel 1BT0062 & TE). By a quick take IDOT acquired the desired parcels and Defendant was awarded $48,300. Plaintiffmoved for an order fixing the "whole". Judge Ami Bertani-Tomczak entered an order designating the "whole" to be Defendant's entire 296 acre farm. (Defendant appeals this order herein.)

Later IDOT filed two pretrial motions to bar the testimony of Kelley's two expert witnesses, Arthur Sheridan and Andrew Brorsen, on the ground their appraisal methodologies violated the "unit rule" of valuation. The trial court denied IDOT's motions. IDOT made an interlocutory appeal to this Appellate Court (Case No. 3-03-0282) which reversed the court order. Defendant petitioned the Supreme Court for leave to appeal but her petition was denied without comment.

The case was remanded. Jury trial was held March

6,2006. Defendant attempted to call Andrew Brorsen, but Plaintiff objected based on this Appellate Court's ruling and he was barred. A lengthy offer of proof was made by Defendant with Mr. Brorsen testifying.

Plaintiff moved for a directed verdict of $48,300 based on the sole testimony of Plaintiffs witness Charles Southcomb. The court reserved its ruling post verdict.

The jury returned a verdict for $70,900. The trial judge granted Plaintiffs motion and reduced the verdict to $48,300 from which judgment the Defendant appeals.

No questions are raised on the pleadings.

## STATEMENT OF FACTS

On December 13, 2000, Plaintiff Department of Transportation. State of Illinois ('IDOT"), filed a Complaint for Condemnation against Defendants Mary A. Kelley, as Trustee under a Trust Agreement dated the 1St day of July, 1975, and known as Trust Number 1 ("Kelley"), and Unknown Owners to condemn parcel 1BT0062 & Th, pursuant to the FY 2000 Highway Improvement Program. (C. 2-14)

The total area of the property held in the Kelley land trust is 289.284 acres, and is a contiguous parcel of land. (See Plaintiffs Exhibit 1) The property acquired is in the northwest corner of the parcel and is comprised of 1.047 acres of right of way and a temporary easement (designated parcel 1BT0062 and 1 BT0062E respectively) to be used for the purpose of widening the intersection of Route 59 and 127"' Street in the Village of Plainfield, State of Illinois. As of the

filing date of LOOT's complaint, the property was zoned A-1 for residential and farm land use. The land is improved with a home that is valued at over $1,000,000.00 and a second farm residence. The remainder of the property consists of farmland, with a small portion of wetland along the DulPage River. Route 59 is an area of large commercial growth with several "big box" retail stores - Target, Wal-Mart, Kohls,Menards and Meijers.

## I. IDOT's Motion For Judicial Determination of Whole Property

After initial pre-trial discovery and the exchange of expert appraisals regarding the subject property, it became apparent that IDOT's expert considered the "whole" of the property to be ±289 acres, while Kelley's expert Andrew Brorsen ("Brorsen"), indicated in his report that he considered the "whole" to be only the west ±80 acres. As a consequence, Brorsen's initial valuation of the property was derived through the comparable sales method for only the west ~80 acres of the firm bordering on Route 59.

## II. IDOT's Motion to Bar Brorsen

IDOT filed a motion to bar Defendant's valuation expert Brorsen from testifying at trial, along with a supporting motion *in limine*. (C. 30-427, 428-33)

On February 7, 2003, the trial court orally denied IIDOT's motion to bar Brorsen's testimony, then entered a written memorandum opinion and order on February 18,2003. (C.462, 465, 466-75) The court held that the valuation methods of Keiley's expert feil

within the purview of the unit rule, and that there was a "reasonable, rational basis" for the experts to evaluate various parts of the parcel differently, given the property's "unique size, configuration and location", the parties' agreement that the property had mixed highest and best uses, and "modem trends in development".

## III. IDOT's Interlocatory Appeal Pursuant to Illinois Supreme Court Rule 308

The trial court granted IDOT's Motion for Supreme Court Rule 308 Appeal on February 26,2003 (C. 463-64,481) and this court granted Leave to Appeal. On September 10,2004 this Appellate Court issued its opinion (C. 631). Defendant petitioned for Leave to Appeal to the Supreme Court which was denied on December 16,2004 (C. 630). Mandate of the Appellate Court was issued January 12, 2005.

## IV. Post Appeal Trial

The case proceeded to jury trial before Judge James E. Garrison on March 7, 2006. Plaintiff called Appraiser Charles Southcomb (R35) as its only valuation witness who opined the value of the part taken as part of the whole 289 acres was $48,000. Mr. Southcomb testified to numerous comparable sales of commercial property along Route 59 - Jewel-Osco $125,453 per acre; self-storage warehouse $109,336 per acre; Menards $92,347 per acre; Meijers $117,612 per acre (R56-57)..

Defendant called Mr. Andrew Brorsen. Plaintiff objected on the basis of the Appellate Court opinion and mandate. Defendant made an offer of proof (R81 and 82).

Brorsen testified that he used the "larger parcel theory" to determine the whole from which the part is taken. He identffied the west 80 acres of the Kelley farm as the whole because its highest and best use was commercial. He described the larger parcel theory in detail (R95) and opined that the value of the part taken is $104,700 (RIOS). Later, Mr. Southcomb was called by Defendant in the Offer of Proof and he admitted testifying previously that he arrived at a value of $92,000 using the larger parcel theory! (R13 8). He testified that the terms "larger parcer' and "the whole" are synonymous (R145).

The jury was instructed and proceeded with deliberations. Significantly, the jury returned two questions to the judge:

> "Can we use the per acre range provided by Southcomb for the big box properties - Menards, Meijer, self-storage?' (C821)
>
> "Can we consider the Jewel property of $125,000 per acre as evidence?' (C822)

Then the jury returned a verdict of $70,900! Plaintiff moved for a directed verdict N.O.V. (C870) which was granted by order on March27, 2006 (C871).

## ISSUES PRESENTED FOR REVIEW

1. Whether this Appellate Court is barred by the doctrine of stare decisis from deciding this case.

2. Whether the trial court should have entered an order fixing the "whole" or "larger parcel" to be Defendant's entire 296 acre farm.

3. Whether Defense expert Brorsen should have been barred from testiI~ing because he based his opinion of value in appraising real estate on the "Larger Parcel Theory" which divided the ~rm into three "zones of use" according to his opinion of highest and best use.

## ARGUMENT

### I

### THIS APPELLATE COURT MAY RULE IN THIS CASE WITHOUT VIOLATING STARE DECISIS

Over the years, our Courts of Appeal had to deal with the objection that the Unit Rule was being violated if a witnesses' testimony assigned different attributes to different portions of the "whole". In the following cases, a court of appeal allowed the testimony overruling this objection.

In the 1936 case of Department of Public Works and Buildings v. Foreman, 363 Ill 13, 1N.E.2d 75, our Supreme Court allowed certain appraisers to testi1~ that one part of vacant parcel is more or less valuable than another part.

> "Appellant first contends that the property taken was erroneously valued by the department's witnesses as a separate piece of property rather than as a part of the entire property. . ..

> Appellant urges that tinder these holdings one part of his land was as valuable as the other, and so the department's witnesses were not considering the part taken as being a part of the entire tract. . .
>
> Because improvements on one part of a tract add to the value of the vacant land when used in connection with the improvements, it does not follow that the vacant land is as valuable as the land which has the improvements on it, nor does it mean that every part of the vacant land is as valuable as every other part. The effect of the testimony of the witnesses for the department was, that in arriving at their estimates of the value of the land taken, they considered the special value it had to appellant in connection with the entire tract and whatever improvements there were upon it. This was proper and was all they were required to consider. This contention must be overruled." (3S3 Ill 13, at 22 and 23.)

In Department of Public Works and Buildings v. Oberlaender, (llLApp.3 Dist. 1 96k, 235 N.E.2d 3,92 Iil.App.2d 174, this Third District Appellate Court recognized that all parts of the whole do not necessarily equally contribute to the value of the part taken:

> "Where the property taken is less than an entire tract, other considerations arise. The highest and best use of the part taken may be as a separate and distinct piece of property unrelated to the entire property endowing such part with a fair cash market value. On the other hand the highest and best use of the part taken may be so related to the entire property that the value of the part

taken for its highest and best use is dependent upon the value of the entire tract. Such relation or dependence may present an issue of fact and each party is entitle to present his theory of independent or denendent valuation.* Where the value of the part taken is dependent upon or related to the value of the entire tract, the fair cash market value thereof is the portion of the value of the entire tract which our hypothetical willing buyer and seller would deem applicable to the part taken. Implicit is such apportionment are two variables. The first is the value of the entire tract and the second is the basis for determining the relation of the part to the whole. It is the nature of the relationshin of the part to the whole which determines the value of the vart since all carts are not necessarily equally related. *Emphasis added". (92 Ill.App 174 at 183) 183.

In Department of Transp. v. HP/Mechuni Land Ltd Partnership, (Il1.App.2Dist.1993) 614 N.E.2d 485,245 Ill,App.3d 252) the Appellate Court 2"" District said:

"When the highest and best use of the property is not uniform throughout the tract in question, an appraiser may testi1~t to the highest and best use for the different portions of the full tract involved.

This rule makes sense in light of the purpose of the 'lust compensation" provision in the constitutions that" '[t]he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken"'. . ..

In addition, this rule does not conflict with the principle of valuing the portion taken as part of the whole and not as a separate parcel. The valua-

tion of the part taken as part of the whole is designed to provide just compensation to the landowner where the land sought to be taken is of greater value when considered as part of the whole than if considered as a parcel by itself."

Much of the confusion in this case is semantics. What does the word "the whole" mean? It does not mean the layman's common understanding of the word "whole"; such as "he ate the whole thing". In eminent domain the "whole" is a word of art:

"It is essential to a partial taking and to the application of the rules on severance damages and special benefits that the land acquired be part of a *unitary holding* (a "whole"), commonly referred to as the larger parceL it is often difficult to determine what constitutes the whole property comprising the part acquired and the remainder, in particular when there are vast acreages or non-contiguous parcels involved. Because of this difficulty, tests have been established to determine the larger parcel. First, there must be a unity of ownership in all parts of the whole. Second, there must be a unity of highest and best use for all parts of the whole."

*Uniform Appraisal Standards for Federal Land Acquisitions* pg 47.

The Defendant and her counsel were quite surprised that this appellate court relied on "stare decisis" in the concurring opinions in the former appeal. This term was never mentioned in the briefs or oral argument.

The case at bar is just another case in a long line of cases which open an appraiser'stestimony concerning

different qualities (and values) of various parts of the whole tract and allows them to identify those differences before a jury using the "larger parcel" appraisal theory. In each case cited the Court of Review rejected the objection that the Unit Rule was being violated.

So if our Supreme Court has held that different parts of the whole can have different highest and best uses and our Appellate Court have held that different parts of vacant land can have different values based on highest and best uses, it certainly not a quantum leap to say that appraisers can employ the larger parcel theory of valuation in testimony before the jury.

Defendant urges this Appellate Court to do the same thing - to reject the Unit Rule argument and allow Defendant's appraiser to use the Larger Parcel Theory of valuation before the jury.

We are aware of the law that says questions decided on a former appeal cannot be raised again in a subsequent appeal.

But there is a question of fundamental f~irness here. Defendant had nothing to do to cause herself to be in this procedural box. Plaintiff IDOT petitioned for the Rule 308 appeal. Over Defendant's objection, this court granted Plaintiff's leave to appeal. Then this court issued its strange 1 to 2 decision on the basis of stare decisis, a point that was never argued. Finally, the Supreme Court refused to grant Defendant's petition for leave to appeal probably because of its policy to take appeals of final orders only.

It seems to us there really was no decision on the merits in the lbrmer appeal because two justices based their decision on stare decisis. At the same time

they agreed with the Defendant's position and asked her to go to the Supreme Court.

It's really a question of form versus substance in this odd set of circumstances without precedent. It has been held that matters concerning the merits of the controversy between the parties which were presented to but not decided by the Appellate Court can be relitigated.*Zokoych v. Spaulding*, 84 Ill.App. 3d 661, 405 NE 2d 1220,40 IlL Dec. 128 (1's Dist. 1980) Prior appellate decision palpably erroneous can be raised again in a subsequent *appeal.Thomason v. Chicago Motor Coach* 298 Il1.App. 626, 19 N.E. 2d 435 (1939).

## II

## THE UNIT RULE AND THE LARGER PARCEL THEORY ARE THE SAME ONLY THE LATTER IS A REFINEMENT IN THE EVOLUTION OF THE FORMER.

What is the Unit Rule and where did it come from?

The Uniform Appraisal Standards for Federal Land Acuuisitions 2000 states at pages 53-55:

"**B-13. The Unit Rule**. The market value concept adopted by the courts to be applied in federal acquisitions generally requires application of the so-called unit rule. This rule has two aspects; one relating to the interests, or estates, into which ownership of real estate may be carved, and the second relating to the various physical components of real estate.

The first aspect of unit rule requires that property be valued as a whole rather than by the sum of the values of the various interests into which it may have

been carved, such as lessor and lessee, life tenant and remainderman and mortgagor and mortgagee, etc. This is an application of the principle that it is the property, not the various interests, that is being acquired. . ..

The whole property or unit valuation remains applicable even where the ownership is divided between such inherently diverse interests as surfiice rights and timber rights or surface and mineral rights. . ..

A second aspect of the unit rule is that difi~rent elements or components of a tract of land are not to be separately valued and added together. For example, the value of timber, as independent component, cannot be added to the value of minerals in the same property as an independent component, and this sum further added to the value of the land. Such a procedure results in a summation or cumulative appraisal, which is forbidden in appraisals for federal acquisitions, as it is in general real estate appraisal practice. The summation appraisal is an invalid procedure because the entire unit is being hypothetically sold in its entirety, not as separate parts individually. . .."

The Unit Rule was established in Illinois inthe nineteenth century when railroads were acquiring right of way. The railroads argued that long narrow strips of land had no value or use except to the railroad whose offer to purchase no matter how low fixed the price and value. The Courts quickly recognized this argument as an abuse and adopted the Unit Rule that the part taken had to be value as part of the whole from which it came.

Over the years, condemners have perverted the Unit Rule into abusive arguments that precluded the land owner from presenting testimony describing how the part taken contributes to or is similar to the whole parcel from which it comes. (This development is deseribed in Part I.) Over the years, these arguments were shot down because they obviously were intended to deny the jury information it should know to award the owner just compensation.

What is the larger parcel?

> "The term larger parcel cannot be found in comprehensive appraisal textbooks such as The Appraisal of Real Estate, but two definitions are provided in The Dictionary of Real Estate Appraisal. One definition of the larger parcel is: 'In condemnation, the portion of a property that has unity of ownership, contiguity, and unity of use, the three conditions that establish the larger parcel for the consideration of severance damages in most states. In federal and some state cases, however, contiguity is sometimes subordinated to unitary use.'

Black's Law Dictionary defines the larger parcel as:

> 'A term used in eminent domain proceedings, signaling that the parcel taken is not a complete parcel but part of a "larger parcel"; the owner, therefore is entitled to damages from the severance as weli as the value of the parcel taken. Unity of ownership, use, and contiguity must be present, although federal courts and some states do not require coutiguity where there is a strong unity of use.'

The larger parcel is sometimes referred to as the parent tract or the rule of joinder.

A second definition of the larger parcel included in the Dictionary of Real Estate Appraisal is more meaningful and useful to appraisers. It reads:

> 'In condemnation, that tract or tracts of land which are under the beneficial control of a single individual or entity and have the same, or an integrated, highest and best use. Elements for consideration by the appraiser in making a determination in this regard are contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use.'
>
> Understanding the concept of the larger parcel is vital in condemnation appraisal because the appraiser cannot determine the highest and best use of a property until a conclusion as to the larger parcel is reach. The larger parcel may be all of one parcel, part of a parcel or several parcels, depending to varying dearees on unity of ownership, unity of use, and contiguity." J.D. Eaton, Real Estate Valuation in Litigation, page 75-76.

The elements that define the larger parcel are (1) Unity of Title; (2) Contiguity and (3) Unity of Use (meaning highest and best use).

However, since unity if use is one of the elements for an integrated unit, it would not necessarily follow that a contiguous body of land in the same ownership constitutes a single unit if the highest and best use for various parts is difi- rent. In this case, the actual parcel from which the land taken is severed has more

than one highest and best use. Only the west 80 acres is identified by Mr. Brorsen as having the highest and best use for commercial development, just like the rest of the comparable sales fronting on Route 59. The remainder of the Kelley farm is irrelevant as far as contributing to or detracting from the value of the part taken.

Much of the confusion in this case is semantics. The work "the whole"does not mean the layman's common understanding of the word "whole", such as "he ate the whole thing". In eminent domain the "whole" is a word of art:

> "It is essential to a partial taking and to the application of the rules on severance damages and special benefits that the land acquired be part of a unitary holding (a "whole"), commonly referred to as the larger parceL it is often difficult to determine what constitutes the whole property comprising the part acquired and the remainder, in particular when there are vast acreages or non-contiguous parcels involved. Because of this difficulty, tests have been established to determine the larger parcel. First there must be a unity of ownership in all parts of the whole. Second, there must be a unity of highest and best use for all parts of the whole."
>
> *Uniform Appraisal Standards for Federal Land Acquisitions. Pg47.*

In the Defendant's offer of proof; Appraiser Andrew Brorsen set forth in great detail the nature of the larger parcel theory and its application to the Keiley property (R94-96). He concludes the west 80 acres of

the Kefley firm is properly the "larger parcel" or "whole" (R94). He describes the three unities test (R95) and compares his larger parcel to comparable sales data.

IDOT's appraiser, Mr. Charles Southcomb, virtually admitted he was practicing size regression in this case (See Defendant's Exhibit No. 6 transcript pages 35 thru 38 where he values that part taken using size regression to be $48,000 per acre and using the larger parcel theory to be $92,000 per acre.)

## III

## BECAUSE OF "SIZE REGRESSION" DEFENDANT WILL NOT RECEIVE JUST COMPENSATION FOR HER PROPERTY

"The fifth amendment to the United States Constitution provides that private property shall not be "taken for public use, without just compensation." *U.S. Const., amend V.* Similarly, our State constitution provides that "private property shall not be taken or damaged for public use without just compensation as provided by law." ill. Const. 1970 art. I, § 1.5. "Just compensation" is determined by the fair cash market value of the property at its highest and best use. *City of Chicago v. Anthony*, 136111. 2d. 169, 174(1990). The purpose ofjust compensation is to put the property owner in the same economic position as if no condemnation took place; it should not result in finanvial improvement or excess." *IDOT v. Kelley* - Opinion of Court - Page 4. . ..

"Not every part of a tract will be as valuable as other parts, and different highest and best uses may

be used in valuing the tract as a whole. *Department of Public Works v. Foreman State Trust and Savings Bank*, 363 Ill. 13 (1936). It may be proper to assign a highest and best use for one portion of the property and a different highest and best use for another. *Department of Public Works v. First National Bank of Joliet*, 9111. App. 3d 633 (1q73). Numerous assignments of use for different parts of the land does not necessarily conflict with the unit rule because it allows the owner to be made whole; it is an equitable resolution to accurately valuing property with different highest and best uses." *Tri-State Park District v. First NationalBank of Cicero*,33 Ill, App. 3d 348,351 (1975)" IDOTv. Kelley - Opinion of Court - Pages 5-6.

That simply is not true! The appraisal prof~ssion and the Federal Government find this method distorts truthful and accurate valuation. The evil, of course, is "size regression".

> "Size regression is the basic economic principle that as the number of units of a commodity increases, the price per unit paid for the commodity decreases. it is the concept of the bulk sales discount. As applied to land, as the number of units (e.g., acres, square feet) in a tract of land increases, the price, or value, per unit tends to decrease." J.D. Eaton, Real Estate Valuation in Litigation, Second Ed. (1995) Appraisal Institute.

The remedy the appraisal profession and the Federal Courts have devised is the "larger parcel" theory of valuation. This permits the appraiser to identi1~ the "larger parcel" (the parcel from which the part taken is taken) by application of three simple rules.

The part taken and the larger parcel must have three unities; unity of ownership, contiguity and unity of highest and best use. The only difference between the "larger parcel" theory and the Forman, First National and Oberlaender cases is that the appraiser is allowed to specifically identify that part of the whole parcel that has the three unities and designate it as the larger parcel.

This is precisely what Keiley's appraiser, Andrew Brorsen does in his appraisal and offer of proof. He sets off and identifies the west 80 acres of the Keiley farm as having the same highest and best use as the part taken, commercial use.

When this is done the size regression problem is eliminated and the appraisal becomes accurate, fair and understandable for the jury to compare sales data. Above all, it results in just compensation for the land owner who is awarded fair market value for his land.

## CONCLUSION

Almost every non-party acquainted with this case has instinctively reacted something is wrong:

Judge Garrison:

> ". . ..I can't see how you could possibly take into consideration fair market value of a multiple use or mixed use property when by not taking - by not breaking it down into its zones of value, it seems to me that would deny the defendant, Ms. Kelley, fair -just compensation as required by; the constitution and the law. . .." *Judge Garrison* R Vol.3 R 96-97. (First

Appeal).

Justices Hoidridge and Schmidt:

> "The purpose to be accomplished in condemnation proceeding is to provide 'just compensation's to the landowner as determined by the fair cash market value of the property at its highest and bust use. The "unit rule" almost never achieves that purpose. Simply put, the "unit rule" ignores realities of land valuation and should give way." *IDOT v. Kelley* Concurring Opinion Page 3.

The jury - see the jury's notes to the judge C 821,C822 - and the verdict of $70,900, some $22,600 higher than Mr. Southcomb's $48,300 highest opinion of value.

Even Mr. Southcomb himself con1~sses he would have arrived at an opinion of value of $92,000 using the larger parcel theory (R138).

Just compensation is being denied the defendant because of the archaic unit rule of valuation. It should now give way.

We believe this appellate court should overrule its prior opinion in this case, reverse Judge Bertani-Tomzak's finding of the larger parcel to be 296 acres, set aside the jury verdict, reverse the trial court's summary judgment N.O.V., grant a new trial wherein Defendant's appraiser's testimony per the offer of proof is allowed (before the jury).

MARY A. KELLEY, Trustee-Defendant-Appellant

By Peterson Law Office, P.C.

By_____

/s/John E. Peterson

John E. Peterson No. 02187043
PETERSON LAW OFFICE, P.C.
1109 N. EasternAve.
P.O. Box 1006
P1ainfie1d, IL 60544
815-436-1200
815-436-1211 fax

## APPENDIX

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**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS**

IDOT,

Plaintiff(s)

vs. Case No. 00 ED 218

Mary Kelley

Defendants

**COURT ORDER**

This matter coming before this court for ruling on IDOT Motion for Judicial Determination of the whole; all parties and the court being duly advised on the premises;

IT IS THEREBY ORDERED:

(1) Judge Bertani Tomcak grants Motion for Determination of the whole and hereby determines the whole property of parcel 1BT0062 to be 289 acres more or less;

(2) A is granted leave ot court to amend her 213(g) disclosure and appraisal/expert report in this matter

(3) This matter is set for 9:00 am March 27, 2007

Name: FDR/ Sara Lund
Attorney For: IDOT
Address: 8 S. Michigan Avenue, Suite 3400, Chicago
Telephone: 312-236-9318

Date: 2002

Entered:_____

We, the jury find the just compensation to be paid to the defendant for the taking of her property to be $ 70, 900.

JURY FOREMAN: STEVE WILL

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS**

Department of Transportation,

Plaintiff(s)

v. Case No 00 ED 0218

Mary Kelley,

**COURT ORDER**

This matter come on for trial by jury on March 6th through March 8th and the pujry returns its verdict in open court finding the DEFENDANTS damages to be $70,900. The jury is pooled and without dissent affirms its verdict and is discharged.

The court reserved its ruling on Plaintiffs motion for directed verdict at the close of the evidence & untila fer the verdict was reutrned. (under 735 ILCS 5/2-1202 (a)

Date: 3/8/06

Entered:_____

Judge

Name:

Attorney For

ARDC#:

Address:

City:

Telephone:

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS**

Department of Transportation,

Plaintiff(s)

v. Case No 00 ED 0218

Mary Kelley,

**COURT ORDER**

This cause coming on to be heard on the Plaintiff's Motion for a Directed Verdict, taken under adjustment in the court, at the close of the evidence, notice having been given, and the court now being advised in the premises:

It is ordered:

1) Plaintiff's metion for a directed verdict is granted;

2) Judgment N.O.V. is granted for Plaintiff and judgment is entered in favor of defendant, Marry A. Kelly, as Trustee, in the sume of Forty Eight Thousand Three Hundred ($48,300) dollars and costs.

3) The matter is stricken from the case fro March 29, 2006.

4) Plaintiff's post-trial motion is withdrawn as moot.

Name: Robert W. Fioretti
Attorney For: Plaintiff
ARDC#: 3121708
Address:39 S. LaSalle St, Suite 400, Chicago, IL 60603
Telephone: (847)324-45429

Date: 3/27/06
Entered: _____
Judge

**IN THE CIRCUIT COURT OF ThE TWELFTH JUDICIAL WILL COUNTY, ILLINOIS**

Department of Transportation,

Plaintiff(s)

v. Case No 00 ED 0218

Mary Kelley,

## COURT ORDER

This matter, coming on for hearing on Defendants Post Trial Motion, Defendant present by John E. Peterson, Plaintiff present by Robert Fioretti.

Arguments heard

It is ordered that Defendants Post Trial Motion for new trial is denied.

| | |
|---|---|
| Name: | John E. Peterson |
| AttomeyFor: | Defendant |
| ARDC#: | 2187047 |
| Address: | P. O. Box 1006 |
| City: | Plainfield, IL 60544 |
| Telephone: | 815-436-1200 |

Date: 4/24/06

Entered: _____

Judge

**APPEAL TO THE APPELLATE COURT OF ILLINOIS THIRD APPELLATE DISTRICT FROM THE CIRCUIT COURT OF WILL COUNTY, ILLINOIS**

DEPARTMENT OF TRANSPORTATION
STATE OF ILLINOIS
Plaintiff-Appellee No. 00 ED 218

vs

MARY A. KELLEY, as Trustee under a Trust Agreement dated the 1St day of July, 1975 and known asTrustNumberl,
Defendant-Appellant

Honorable James E. Garrison and Honorable Amy Bertani Tomczak

## NOTICE OF APPEAL

The Defendant Mary A. Kelley, as Trustee under a Trust Agreement dated the 1St day of July, 1975 and known as Trust Number 1, by her attorney Appeals to the Appellate Court of Illinois Third District from:

1. From the Order entered on by Hon. Judge Amy Bertani Tomczak fixing the "larger parcel" to be Defendant's whole 296 acre farm.
2. From the Order entered on March 7,2006 by Hon. James E. Garrison, granting the Plaintiff Motion in Liinine barring Defendant's valuation expert witness Mr. Andrew Brorsen from testifying on behalf of Defendant.

3. From the Order entered on March 27,2006 by Hon. James E. Garrison granting the Plaintiff's reserved motion for directed verdict and judgment not withstanding the verdict reducing the jury verdict to a directed verdict of $48,300.

4. From the Order entered on April 24, 2006 by Hon.. James E. Garrison denying the Defendant's Post Trial Motion denying the Defendant a new trial.

By this appeal the Defendant seeks the following relief from the Appellate Court of Illinois or the First District:

1. Reversal of the Order fixing the "larger parcel" to be Defendant's whole farm being 296 cres.

2. Reversal of Order entered on March 7, 2006 barring Defendant's valuation witness Mr. Andrew Brorsen from testilying on behalf of Defendant.

3. Reversal of the Order entered March 27, 2006 granting Plaintiff's reserved motion for directed verdict and entering judgment not withstanding the verdict of $48,300.

4. Reversal of the Order entered April 24, 2006 denying the Defendant's Post Trial Motion for a new trial.

5. Entry of an Order remanding this cause to the Circuit Court of Will County for a new trial and for such other relief as Defendant-Appellant may be entitled to on this appeal.

Dated: May 10,2006

Mary A. Kelly, trustee

Defendant-Appellant

By _____

John E. Peterson, her attorney

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Plaintiff's Trial Exhibit No. 1
Map of Wheatland Township Showing Plaintiff's Appraiser's Comparable Property Locations Marked As Orange Circles for Numbers 1, 2, 3 and in Red Circles for Numbers 4, 5, 6 and 8.

Plaintiffs Trial Exhibit No. 2
Map of Plainfleld Township Showing Plaintiffs Appraiser's Comparable Property Location Marked as Number 7 in a Red Circle.

Plaintiff's Trial Exhibit No. 3
Color Aerial Photograph of the Subject Property.

Plaintiff's Trial Exhibit No.4
Copy of the Plat of Highways Prepared by the Illinois Department of Transportation Showing the Widening of Illinois Route 59 on the Subject Property.

Defendant's Trail Exhibit No.1
Map of Wheatland Township

Defendant's Trail Exhibit No.2
Comparable Sales Map

Defendant's Trail Exhibit No.3
Comparable Sales Map

Defendant's Trail Exhibit No.4
Comparable Sales Map

Defendant's Trail Exhibit No.5
MidAmerica Ariel Map of Development

Defendant's Trail Exhibit No.6
Partial Transcript of Testimony of C. Southcomb

Miscellaneous Exhibits

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